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ON

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BY JOHN WILLARD, LL. D.

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Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert.

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PREFACE.

ALTHOUGH there are numerous treatises devoted to the subject of Equity Jurisprudence, yet there is none which occupies the same ground as the following. Those which are published in England necessarily embrace much matter which is of but little practical value to us, and the commentaries of Mr. Justice Story professedly treat Equity Jurisprudence, as it was administered in England and America at the time he wrote. The learned author has also, in numerous instances, while tracing the doctrines of the court to their origin, compared the law, as administered in England and America, with the corresponding portions of the civil law, and of the laws of the most enlightened nations of continental Europe.

The plan of the following treatise has not lead me to pursue the same course. Though most of the topics which are handled by other writers on Equity Jurisprudence, and some which are not noticed by them at all, are treated with more or less fullness in this work, yet they are discussed with reference to the law as it exists in this state at the present time, modified as it has been by the Revised Statutes, the Code of Procedure and the constitution of 1846. The reported decisions of the late court of chancery, in connection with the decisions in equity of the courts under the present constitution, afford of themselves sufficient materials for a system of Equity Jurisprudence. I have not, however, confined myself solely to these, but have freely quoted the decisions of the English courts, and those of our sister states, when they served to confirm or illustrate the doctrines advanced. But I have not attempted to point out the diversities which doubtless exist in the several states, arising from local usage and statutory regulations.

It would be unjust to those who have written on the same and kindred subjects, not to admit that I have been greatly instructed and aided by

their labors. Every systematic treatise on any department of jurisprudence facilitates the acquisition of a knowledge of the science. It is, however, to the adjudged cases that we are to look for the authoritative exposition of the law.

But though the present work is adapted more particularly to the present state of the law in New-York, it is far from being a merely *local* work. The general principles of Equity Jurisprudence are presumed to be the same in substance in most of the states. The diversities arising from local legislation, or from usage in other states, will be readily discovered by those practicing in their courts. The work will be less likely to mislead the reader, than if it had attempted to describe the exact state of the law in each of the states. Such a task cannot be successfully accomplished by any one writer.

No one can be more sensible of the imperfections of the present work than the author. The variety of the topics discussed, the complicated nature of many of them, and the occasional conflict of decisions with respect to others, render the task of constructing a consistent system, laborious in the extreme. To settle points about which learned judges continue to differ, is no easy matter. In some few instances I have merely stated the arguments and authorities on each side, and left the learned reader to draw his own conclusions. In most cases, however, after stating the points in dispute, I have indicated my own opinion, in conformity to what I conceived to be the weight of authority, or the general analogy of the law. It will not be surprising if some of these opinions should prove to be erroneous.

It is not, perhaps, possible to fix the line which separates Equity Jurisprudence from that which is generally administered by Courts at Common Law. The tendency of late has been to abrogate the distinction which formerly prevailed between courts of law and courts of equity. I have brought under review most of the subjects which, in this state, have been usually discussed and adjudicated in courts of equity, notwithstanding some of them in England and elsewhere belong to a different forum; and notwithstanding all of them are now administered here by the same tribunal. In the hope that the work may serve, in some measure, to assist the young and inexperienced in acquiring a knowledge of this branch of our jurisprudence, and lessen the labors of the more advanced practitioner, I submit it with diffidence to the scrutiny and candor of the profession.

SARATOGA SPRINGS, May, 1855.

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ERRATUM.

On page 316, 3d paragraph, 2d line, for "complainants" read *claimants*.

EQUITY JURISPRUDENCE.

INTRODUCTION.

SECTION I.

EQUITY, A BRANCH OF JURISPRUDENCE, DISTINCT FROM LAW, THOUGH NOT ADMINISTERED BY A TRIBUNAL EXCLUSIVELY DEVOTED TO IT; WITH A SKETCH OF THE RECENT CHANGES IN NEW-YORK.

THE recent changes introduced by the constitution of 1846, and by subsequent legislation, have made it expedient to inquire how far equity, as distinct from law, remains a part of the jurisprudence of this state. At an early period in our colonial history, equity was administered by a tribunal separate from courts of law. The constitution of 1777 recognized the office of chancellor and judges of the supreme court, and prescribed the tenure of their offices. The court of chancery and supreme court were organized as separate tribunals, the one as a court of equity and the other as a court of law. The two courts were continued, and their jurisdiction was preserved separate, by the constitution of 1821, and so remained until both were abolished by the constitution of 1846.[1]

The present constitution creates a supreme court having general jurisdiction in law and equity.[2] It clothes the legislature with the same power to alter and regulate the jurisdiction and proceedings in law and equity as they theretofore possessed.[3] It provides that testimony be

[1] Const. 1777, art. 25. Waterman's Am. Ch. Dig., Introduc. p. 46. Const. 1821, art. 5, §§ 3, 4. 2 R. S. 168. Preface to vol. 1, John. Ch. R. 2 Greenleaf, L. N. Y. 108 et seq. 1 R. L. of 1813, pp. 318, 436. Const. of 1846, art. 14, § 8 Gov. Dongan's Report in 1687, 1 Doc History, 147.

[2] Const. art. 6, § 3.

[3] Id. § 5.

taken in equity cases in like manner as in cases at law.[1] It empowers the legislature to confer equity jurisdiction in special cases upon the county judge.[2] It declares that such parts of the common law, and of the acts of the legislature of the colony of New-York, as together did form the law of the said colony on the nineteenth of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, and of the convention of the state of New-York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which had not then expired, or been repealed or altered, and such acts of the legislature of this state as were then in force, should be and continue the law of the state, subject to such alterations as the legislature should make concerning the same.[3]

The same section abrogates all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to the constitution; and by a subsequent article, it requires the legislature, at its first session after the adoption of the constitution, to provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify and abridge the rules and practice of the courts of record of this state, and to report thereon to the legislature, subject to their adoption and modification, from time to time.[4] Before the commissioners made their report, the legislature, by their act of May 12, 1847,[5] organized the higher courts created by the constitution. By the 16th section of that act, it is enacted that the supreme court shall possess the same powers, and exercise the same jurisdiction, as was then possessed and exercised by the (then) supreme court and court of chancery; and that the justices of the said court shall possess the powers, exercise the jurisdiction (then) possessed and exercised by the justices of the late supreme court, chancellor, vice chancellors and circuit judges, so far as the powers and jurisdiction of said courts and officers shall be consistent with the constitution and provisions of the act. The section also makes all laws relating to the late supreme court and court of chancery, or any court held by a vice chancellor, and the jurisdiction, powers and duties of said courts, the proceedings therein, and the officers thereof, their powers and duties, applicable to the supreme court organized by the act, the powers and duties thereof, the proceedings therein, and the officers thereof, their powers and duties, so far as the same can be applied and are consistent with the constitution and the said act. The

[1] Const. art. 6, § 10.
[2] Id. § 14.
[3] Const. art. 1, § 17.
[4] Const. art. 6, § 24.
[5] L. of 1847 p. 319

statute also organizes the general and special terms of the supreme court, the former mainly as an appellate tribunal, and the latter, amongst other things, to hear and determine suits and proceedings in equity, and it requires that all suits and proceedings in equity, in said supreme court, shall be first heard and determined at a special term of said court, unless the justice holding such term shall direct the same to be heard at a general term. Provision is also made for rehearing at a general term, on the application of either party, of any suit or proceeding in equity heard and determined at a special term.[1]

The act of May 12, 1847, above cited, and the amendatory act of December 14, 1847,[2] were designed to vest in the various courts, created by the constitution, the powers and jurisdiction possessed and exercised by the courts which existed prior to its adoption. The same judges were empowered to administer law and equity. Neither the constitution or the statute altered the *form* of remedy. The subjects of jurisdiction, too, remained unchanged.

In pursuance of the requirements of the act of April 12, 1847, § 24,[3] the justices of the supreme court assembled at the capitol in Albany, in July of that year, and established the rules for governing the practice of the courts, by revising and altering those which were in force at the adoption of the constitution, and making such new ones as were required by the new organization. These rules assume that law and equity, though administered by the same tribunal, are different branches of jurisprudence, and are most conveniently administered by different forms of procedure. The practice under those rules, continued without objection, until the following year, when the commissioners of pleading and practice reported, and the legislature adopted, the first code of procedure.[4]

The code was amended in 1849, 1851, and again in 1852, and as so amended, controls the practice of the courts, as far as it extends. There are numerous cases not provided for by the code, which are still governed by the former practice of the courts.

The 140th section of the code of 1852, is in these words: "All the forms of pleading heretofore existing, are abolished; and hereafter, the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings are to be determined, are those prescribed by this act." The first section of the code divides remedies in the courts of justice into *actions* and *special proceedings:* It defines an action to be an ordinary proceeding in a court of justice, by

[1] L. of 1847, p. 323–325.
[2] L. of 1847, p. 638.
[3] L. 1847, p. 327.
[4] Code of 1848.

which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding. Actions are of two kinds, civil and criminal—a criminal action is prosecuted by the people of the state, as a party, against a person charged with a public offense, for the punishment thereof. Every other is a civil action.

The abrogation of the ancient *forms* of pleading, and the establishing of a uniform system of remedies in the courts, do not abrogate the distinction between law and equity, nor require that every cause of action should be set forth in the same terms. The code itself says, that the complaint shall contain the title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant, a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition, and a demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.[1] The statement of the facts will vary with the nature of the wrong to be redressed, or contract to be enforced; and the definition of the complaint is as appropriate to a bill in chancery for relief against a fraudulent assignment, as to a declaration at law for a battery, or to recover the amount of a promissory note.

The confusion arising from a misjoinder of parties and causes of action, is guarded against by the 167th section of the code. The section allows the plaintiff to unite in the same complaint several causes of action, whether they be such as have been heretofore denominated *legal* or *equitable*, or both, when they all arise out of, (1,) the same transaction or transactions connected with the same subject of action; (2,) contract, express or implied; or, (3,) injuries with or without force, to person and property, or either; or, (4,) injuries to character; or, (5,) claims to recover real property, with or without damages, for the withholding thereof, and the rents and profits of the same; or, (6,) claims to recover personal property, with or without damages, for the withholding thereof; or, (7,) claims against a trustee, by virtue of a contract, or by operation of law. But the causes of action, so united, must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

The continuance of equity as a distinct branch of jurisprudence, and

[1] Code of 1852, § 142.

of the application of equitable as well as legal remedies, are plainly inferrible from the language of the code, and have been repeatedly recognized by the courts.[1] The former names of actions are dispensed with. The subject matter which constitutes the basis of the claim to relief must be stated now, as well as formerly, but the cumbrous phraseology which sometimes obscured the facts in a former bill in chancery, is dispensed with, and the material *facts* alone, in distinction from matters of evidence, are required to be set forth.

The complaint under the code, contains no prayer for process. The names of the parties, plaintiff and defendant, must appear in the complaint, and the prayer for relief.

SECTION II.

GENERAL NATURE OF EQUITY.

HAVING thus shewn that equity, as distinct from law, still remains a branch of our jurisprudence, it will be convenient to consider what is understood by that term. In its most general and comprehensive sense, equity is often used to denote natural justice. In this sense it relates to the disposition which all should cherish of rendering to every one his due, rather than to a system of remedial justice. It corresponds to the definition of justice, or natural law, as given by Justinian. *Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*[2] In a more restricted sense, it is used as denoting a rule of construction or interpretation. When the words of a law are dubious, regard must be had to its reason and spirit. It often happens that when the reason of the law ceases, the law itself ceases with it. *Cessante ratione legis cessat ipsa lex.*[3] This is well illustrated in the case put by Cicero, as quoted by

[1] Getty v. Hudson R. Railroad, 6 How. Pr. R. 269. Bouton v. City of Brooklyn, 7 id. 198; S. C., 15 Barb. 385. Knowles v. Gee, 8 id. 300. Wooden v. Waffle, 6 How. Pr. R. 145. Rochester City Bank v. Suydam, 5 How. 216. Linden v. Hepburn, 3 Sand. S. C. R. 668; S. C., 5 How. 188. Millikan v. Carey id. 272. Williams v. Hays, id. 470. McMurray v. Gifford, id. 14. Russell v. Clapp, 4 id. 374. Glenny v. Hitchins, 4 id. 98, 99. Giles v. Lyon, 4 Coms. 599. Grant v. Quick, 5 Sand. S. C. R. 612. Gardner v. Lee, 11 Barb. 558. Hinman v. Judson, 13 id. 629, 631. Hunt v. Farmers' Loan, 8 How. 416. Van Horne v. Everson, 13 Barb. 531.

[2] Inst. lib. 1, tit. 1.

[3] Co. Litt. 70, b. Broom's Maxims, 115.

Blackstone.[1] "There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to them who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was to give encouragement to such as should venture their lives to save the vessel. But this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation."

From this method of interpreting laws by the reason of them, says Blackstone, arises what we call equity; which is thus defined by Grotius, "the correction of that wherein the law by reason of its universality is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which, had they been foreseen, the legislator himself would have expressed; and these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"[2]

And in another place the same learned commentator says, "Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this, equity is synonymous with justice; in that, to the true and sound interpretation of the rule.[3]" In this sense, equity must have a place in every system of jurisprudence, in substance if not in name. No system of human laws is so perfect but that cases must occur in which general rules cannot be applied without injustice, and perhaps not applied at all. It is the province of the judge so to construe them, when they arise, as to accomplish the object of the lawgiver, if it can be done without violence to the letter.

Equity is sometimes used in still another sense, as denoting a system supplementary to the law. In this sense it was used by Bacon on the occasion of his accepting the office of chancellor. Chancery, said he, is ordained to supply the law and not to subvert the law.[4] And the author of the Treatise of Equity, a work of high repute, after remarking upon the necessity of having recourse to the natural principles, that what was

[1] Com. 61.
[2] 1 Bl. Com. 61.
[3] 3 Bl. Com. 429.
[4] Bacon's speech, 4 Bac. Works, 483.

wanting to the finite may be supplied out of that which is infinite; and that this is what is called equity, in opposition to strict law, observes: "And thus, in chancery, every particular case stands upon its own particular circumstances; and although the common law will not decree against the general rule of law, yet chancery doth, so as the example introduces not a general mischief. Every matter, therefore, that happens inconsistent with the designs of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to any thing contrary to the law of nature; and indeed no man in his senses can be presumed willing to oblige another to it. But if the law has determined a matter, with all its circumstances, equity cannot intermeddle; and for the chancery to relieve against the express provisions of an act of parliament, would be the same as to repeal it. Equity, therefore, will not interpose in such cases, notwithstanding accident or unavoidable necessity; so that infants had been bound by the statute of limitations, if there had been no exception in the act. And although in matters of apparent equity, as fraud or breach of trust, precedents are not necessary, it is dangerous to extend the authority of the court further than the practice of former times."[1]

Notwithstanding the qualification in the latter part of the above quotation, the assertion that chancery will decree against the general rule of law, and relieve against every mischief which happens contrary to natural justice, is not founded in principle or supported by authority. An eminent equity judge, in one of his most elaborate judgments,[2] has placed this subject in a clear light: "The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraque servat;* and it is said in Rook's case, 5 Rep. 99 b, that discretion is a science not to act arbitrarily, according to men's wills and private affections; so, the discretion which is executed here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other; this discretion, in some cases, follows the law implicitly; in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discre-

[1] Fonb. Equity, book 1, ch. 1, § 3.

[2] Sir Joseph Jekyl, M. R. in Cowper v. Cowper, 2 P. Wms. 753.

tionary power, which neither this, nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with." Sir Thomas Clarke adopted this very language, and gave it his approbation, in Burgese *v.* Wheate.[1] Lord Redesdale, in Bond *v.* Hopkins,[2] observed: "There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed."

These principles received the full concurrence of the late Chancellor Kent, in the early part of his splendid career as chancellor.[3] When pressed to depart from the settled rule of the English chancery, he said, "I take this occasion to observe, that I consider myself bound by those principles, which were known and established as law in the courts of equity in England at the time of the institution of this court; and I shall certainly not presume to strike into any new path, with visionary schemes of innovation and improvement; *via antiqua via est tuta.*" After remarking on the necessity of drawing his knowledge from books and not from his own head, he says, "This court ought to be as much bound as a court of law, by a course of decisions applicable to the case, and establishing a rule. As early as the time of Lord Keeper Bridgman, it was held that precedents were of authority; and that it would be very strange and very ill to disturb a rule in chancery which had been settled. (1 Mod. 307.) The system of equity principles which has grown up and become matured in England, and chiefly since Lord Nottingham was appointed to the custody of the great seal, is a scientific system, being the result of the reason and labors of learned men for a succession of ages. It contains the most enlarged and liberal views of justice, with a mixture of positive and technical rules, founded in public policy, and indispensible in every municipal code. It is the duty of this court to apply the principles of this system to individual cases, as they may arise; and, by this means, endeavor to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions at home." Lord Chancellor Talbot, when pressed with the hardship of a particular case, said, "If the law, as it now stands, be thought

[1] 1 W. Black. R. 123.

[2] 1 Schoale & Lefroy, 428, 9.

[3] Manning v. Manning, 1 J. Ch. R. 530.

inconvenient, it will be a good reason for the legislature to alter it, but till that is done, what is law at present must take place."[1]

A court of equity has no power to relieve against a general rule of law; nor to abate the rigor of the common law; nor to afford relief in cases against natural justice in every case, for many such exist, without any redress, legal or equitable.[2] Nor is it governed by the mere opinion of the judge, founded on the circumstances of each particular case. On the contrary, says Blackstone,[3] the system of our courts of equity is a labored, connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection. In short, he says, if a court of equity in England did really act, as many ingenious writers have supposed it, from theory to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case.

After a careful review of the subject Mr. Justice Story says:[4] "Equity jurisprudence may properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a court of common law." And in another place,[5] he says: "Perhaps the most general, if not the most precise, description of a court of equity in the English and American sense is, that it has jurisdiction in cases of rights recognized and protected, by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the courts of common law." However accurate this description may be in a country where law and equity are administered by different forms and in different tribunals, it is scarcely applicable to the courts of this state since the code has abolished all previous forms of pleading, and the distinction between legal and equitable remedies, and established a uniform course of proceeding in all cases, and the constitution has vested in the same tribunal both legal and equitable jurisdiction.

There are three modes of considering the great mass composing the jurisdiction of equity. The first is by the *subjects* cognizable in equity, the second is by a comparison of the *powers* of equity, with those of the common law, and the third is by the modes of trial, the modes of proof and the modes of relief. Mr. Maddock has adopted the first mode, and has distributed equity jurisdiction under six heads: 1, accident and mistake; 2, account; 3, fraud; 4, infants; 5, specific performance of agreements; and 6, trusts.[6] Considered with reference to the second mode, the

[1] Head v. Stamford, 3 P. Wms. 412.
[2] 3 Black. Com. 430 et seq.
[3] Id. 432.
[4] 1 Story's Equity, § 25.
[5] Id. § 33.
[6] 1 Mad. Ch. Pr. 21.

jurisdiction of equity is *assistant, concurrent* and *exclusive.*[1] The object of the third mode is merely to point out the line of division between the jurisdiction at law and in equity.

With us, since the adoption of the constitution of 1846, the mode of proof in equity is the same as at law,[2] and the code has prescribed the same mode of trial in all cases. These circumstances, therefore, cease to be a criterion to determine whether the subject of the action be of legal or equitable cognizance. Equity, too, has ceased with us to be *assistant* to a court of law. The code forbids any action to obtain discovery under oath, *in aid of the prosecution or defense of another action,*[3] but prescribes as a substitute, a mode of examining a party as a witness, at the instance of the adverse party. Hence a mere bill of discovery, in aid of another action, is rendered unnecessary. There are many cases in which courts of law and equity entertain concurrent jurisdiction. To this class belong most of the subjects of equitable cognizance. This concurrence of jurisdiction has its origin in one of two sources; either the courts of law, though they have general jurisdiction in the matter, cannot give adequate, specific and perfect relief; or, under the actual circumstances of the case, they cannot give any relief at all.[4] The former occurs in all cases where a simple judgment for the plaintiff or for the defendant does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations and cross-claims are to be introduced and finally acted on; and a decree meeting all the circumstances of the particular case between the very parties is indispensable to distributive justice. The latter occurs where the object sought is in capable of being accomplished by the courts of law; as for instance, a perpetual injunction to restrain nuisances and the like.[5]

Perhaps no better test, under the code, can be found to determine whether the action be brought to enforce a legal or an equitable right, *than the prayer for relief.* If the cause of action stated in the complaint requires other relief than the payment of money, or the recovery of real or personal property, under subdivisions 5 and 6 of section 167, and such relief be prayed, the action must be treated as of an equitable nature. Chapter 6, § 274 of the code, allows judgment to be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and permits the court to determine the ultimate rights of the parties on each side as between themselves. This provi-

[1] 1 Fonb. Eq. B. 1, ch. 1, § 2, note. Cooper's Equity, 26.
[2] Const. art. 6, § 10.
[3] Code, § 389.
[4] 1 Story's Equity, § 76.
[5] Id.

sion, borrowed from the former chancery practice, is inapplicable to an ordinary action at law, and is absolutely indispensable in actions of an equitable character, where the parties are numerous, the transactions complicated, and conflicting equities are to be adjusted. Relief may be obtained under the code in all cases where it could be granted before, whether at law or in equity. The subject of rights and wrongs remains unchanged. The remedy to enforce them, or to prevent their violation, or to obtain satisfaction for their violation, still exists, but under a different name. A civil action, *nomen generalissimum*, comprises within itself all the former actions, both at law and in equity. Whatever right is sought to be enforced or wrong redressed, the complaint must contain the facts which constitute the cause of action, and the prayer for the proper relief. Like a bill in chancery under the former practice, it should state a consistent case on behalf of all the plaintiffs, if there be more than one; and state it in direct terms, with reasonable certainty, and without scandal or impertinence.[1] The charges, pretenses and interrogatories are no longer necessary.

The doctrines of a court of equity are as important to be understood, in practicing under the code, as before it was adopted. The code is a mere system of practice. It has not changed the nature of human transactions, nor has it repressed the avidity for gain, nor the competitions of ambition, nor the unscrupulous graspings of avarice, nor the encroachments of selfishness and fraud. The sources from which litigation heretofore sprung are by no means dried up, and the same causes will continue to engender the like controversies, and afford, as in former times, employment for courts of justice.

There is the same necessity now, as heretofore, for an accurate knowledge of the various branches of jurisprudence. A knowledge of equity jurisprudence, in particular, is an essential part of the education of every lawyer, as well under the present, as under the former system. A treatise on that subject is of equal, if not of more importance than formerly, since it cannot be doubted that the blending of all actions into one single form may, in some instances, cast a doubt over the rights which they are designed to protect. The circumstances under which equity will afford relief, in cases of accident and mistake, the specific performance of agreements, the accounts of copartners, the execution of trusts, the prevention of fraud, and the various other branches of equity cognizance, are as important to be known as they were under the former practice. No pleader can set forth, with legal precision, the facts which

[1] Adams' Equity, Introd. 78.

constitute his cause of action, without an accurate knowledge of rights and remedies.

In treating the subject of equity jurisprudence under the present organization of the courts of this state, the distinction between what was formerly called *the concurrent*, *the exclusive* and *the auxiliary* jurisdiction of courts of equity, seems inappropriate, except with reference to the past. No arrangement of the various subjects can be so made but that they will occasionally run into each other. It has never been possible to fix a line beyond which the courts would not afford relief. If such line could be ever fixed, the region beyond it would at once become the favorite theater of fraud, injustice and oppression. It is nevertheless desirable, for the sake of perspicuity, that the subjects of discussion should be arranged under titles that will indicate their general nature We shall accordingly, after a brief survey of the leading maxims of equity, indicate the general distribution of the subject.

SECTION III.

GENERAL VIEW OF THE MAXIMS OF EQUITY AND DISTRIBUTION OF THE SUBJECT.

IN considering the subject of equity jurisprudence, it may be well, in the first place, to bring to the notice of the reader some of the maxims and principles, by which courts of equity are governed in administering relief. "Maxims," it has been truly said, "are the condensed good sense of nations." Those which pertain to this department of the law, have the sanction of ages in their favor. They grew up, for the most part, under a system in which equity was administered by a separate tribunal, distinct from courts of law. Some of them are not perhaps strictly applicable, or are to be received with modifications, under a system in which law and equity are sought to be blended into one, and are administered by the same judges and forms of procedure. Among these, it is a common maxim, that equity follows the law, *æquitas sequitur legem*.[1] In countries where equity is administered by different tribunals, this maxim is susceptible of various interpretations. It may mean that equity adopts and follows the rules of law in all cases; or, that in dealing with cases of

[1] Burrell's Law Dict. 427.

an equitable nature, it follows the analogies of law.[1] To a certain extent it is true in both senses, but not universally so in either. A court of equity can in no case relieve against a positive act of the legislature, or an established rule of the common law. It cannot enforce specifically an agreement void by the statute of frauds, if the defendant insists on the statute, unless an equity is raised in favor of the party calling for its performance, which cannot otherwise be satisfied.[2] The cases on this point go upon the ground, that the refusal to complete the purchase would operate as a fraud upon the other party. In many cases, equity acts in analogy to the rules of law, in relation to equitable titles and estates. Thus, before the statute of limitations applied to equitable demands, equity required relief to be sought in relation to titles to land, within the period in which an ejectment would lie; and in cases of personal claims, within the period prescribed for personal suits of a like nature.[3] But the principles of these cases were adopted by the revised statutes, and have since been incorporated in the code;[4] and an express limitation has been adopted for cases of which equity has sole and exclusive cognizance.[5]

The maxim that equity follows the law, though true in certain senses, admits of various exceptions. It cannot be said that where the law affords no remedy, there is none in equity; nor can it be affirmed that in administering equity, no regard is had to the rules of law.[6]

It is another maxim, that where the equities are equal, the law must prevail.[7] In such case, the defendant has as good a right to the protection of the court as the plaintiff has to relief, and thus another rule intervenes: *In equali jure melior est conditio possidentis.*[8] When parties have been equally innocent and equally diligent, a court of equity leaves them as they were. If the defendant has an equal claim to the protection of a court of equity, to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interfere on either side.[9] If there be several equal equitable interests affecting the same estate, they will attach upon it, according to the periods at which they commenced, according to another maxim of equity

[1] Wooddeson's Lect. 56, pp. 479 to 482. Story's Eq. Jur. § 64.

[2] German v. Machin, 6 Paige, 292. Philips v. Thompson, 4 John. Ch. R. 149.

[3] Fonb. Eq. lib. 1, ch. 4, § 27, and notes. Kane v. Bloodgood, 7 John. Ch. R. 118. Murray v. Carter, 20 John. R. 576.

[4] 2 R. S. 301. Code, § 97.

[5] Id.

[6] Kemp v. Pryor, 7 Ves. 249, 250.

[7] Francis' Maxims, Maxim 14. Fonbl Eq. book 1, ch. 4, § 25. Fitzsimmons v Ogden, 7 Cr. 2.

[8] Id.

[9] Beekman v. Frost, 18 John. R. 562. S. C. 1 John. Ch. R. 300. Fonbl. Eq. book 3, ch. 3.

as well as law: *qui prior est tempore, potior est jure.*[1] Where the legal estate is outstanding, equitable incumbrances must be paid according to priority of time.[2] But the rule is only applicable to mere equities.[3] If, therefore, a subsequent incumbrancer, in order to protect himself against mesne incumbrances, obtains a conveyance of the legal estate, equity will not deprive him of his legal advantage, unless, at the time he lent his money, he had notice of the mesne incumbrance, or obtained the conveyance of the legal estate after decree; for though the second or mesne incumbrance be prior to the subsequent incumbrance in point of time, yet it furnishes a merely equal equity with the subsequent incumbrancer, who, having by greater diligence obtained the legal estate, shall be allowed to retain his advantage.[4] But if the second or mesne incumbrancer has obtained a decree for an account, a subsequent incumbrancer cannot, by buying in the first incumbrance, defeat the effect of such decree.[5] The doctrine of tacking owes its origin to these principles, but does not apply between registered mortgages in this state. The registry is notice to all the world, and they must be paid off according to their priority.[6] But this doctrine belongs to a subsequent chapter, and is referred to here, merely to illustrate the maxims referred to.

If the equities be unequal, the preference will be given to the superior equity.[7]

Another maxim, "*he who seeks equity must do equity,*" is of equal importance, and lies, says Sandford, J., at the foundation of equity jurisprudence.[8] Thus, a lessor cannot, in the same complaint, seek a forfeiture of a lessee's term and an injunction against a breach of his covenant as to the particular use to be made of the tenement.[9] The borrower of money upon usurious consideration could not, before the revised statutes of 1830,[10] maintain a bill for discovery or relief, unless upon the terms of paying the lender the sum actually loaned, with lawful interest.[11]

[1] Berry v. Mut. Ins. Co. 2 J. Ch. R. 608. Wilkes v. Harper, 2 Barb. Ch. R. 338. Bristol v. Hungerford, 2 Vern. 525. Brace v. Marlborough, 2 P. Wms. 495.

[2] Id.

[3] Blake v. Hungerford, Pre. Ch. 159.

[4] Turner v. Richmond, 2 Vern. 81. Hawkins v. Taylor, id. 29. Morett v. Parke, 2 Atk. 52. Id. 347.

[5] Wortley v. Birkhead, 3 Atk. 811.

[6] Bridgen v. Carhartt, Hopk. 234. Grant v. U. S. Bank, 1 Caines' Cas. in Error, 112. Frost v. Beekman, 1 John. Ch. R. 298, 299 Parkist v. Alexander id. 394.

[7] Jeremey's Eq. Jur. 285, 286. Story's Eq. Jur. § 64 d.

[8] Linden v. Hepburn, 3 Sand. S. C. R. 671. S. C., 5 How. Pr. R. 188.

[9] Id.

[10] 1 R. S. 772, § 8; and see L. of 1837 p. 487, § 4.

[11] Post v. Bank of Utica, 7 Hill 391 Rogers v. Rathbun, 1 J. Ch. Cas. 367 Tupper v. Powell, id. 439. Fanning v Dunham, 5 id. 142. Livingston v. Harris 3 Paige, 533, S. C. 11 Wend. 329. Vilas v. Jones, 1 Coms. 278. Legoux v. Wante. 3 Har. & John. 184.

But this maxim does not interfere with the defense of usury, if the lender seeks the aid of the court to enforce payment of the security. Here a new rule applies. It is a settled principle of the common law, says Chancellor Walworth, that no court will lend its aid to enforce the performance of a contract which is contrary to public policy, or any contract or agreement which was intended by the parties to contravene the provisions of a positive law.[1] Usury may thus be shown as a defense to a bill of foreclosure.[2]

The maxim, *equality is equity*, is of extensive use. It is applied in a variety of cases, as will be hereafter seen, as in cases of contribution between sureties and others, abatement of legacies where there is a deficiency of assets, and in case of the marshalling and distribution of equitable assets.[3] Chancellor Kent says, the general doctrine is to encourage, as much as possible, the idea of equitable assets, because equality in the payment of debts is equity, and the rule of distribution in chancery is founded on principles of natural justice.[4] A court of equity, in the distribution of legal assets, follows the rule of law, to prevent confusion in the administration of the estate; but whenever the assets are considered as equitable, then it is well and uniformly settled that they are to be distributed among all the creditors *pro rata*, without giving preference.[5]

Equity treats a thing as done which ought to be done. Thus, it considers land directed to be sold and converted into money as money; and money directed to be employed in the purchase of land as land.[6] But it may be material to remark, that nothing is looked upon in equity as done but what ought to be done, not what might have been done; nor will equity consider things in that light in favor of every body, but only for those who had a right to pray it might be done.[7] The force of the rule is evinced by those cases in which it has been held, that the money agreed or directed to be laid out, so fully becomes land, as, 1st, not to be personal assets; 2d, to be subject to the curtesy of the husband, though not to the dower of the wife; 3d, to pass as land by will, if subject to the real

[1] Pratt v. Adams, 7 Paige, 615.

[2] Id. Cowles v. Woodruff, 8 Conn. 35. Morelew v. Armstrong, 3 Monroe, 289. Trumboe's Ex'r v. Blizzard, 6 Gill & John. 18. Fanning v. Dunham, 5 J. Ch. R. 136.

[3] Francis' Maxims, 9, max. 3. Burrell's Law Dict. 426. 2 Will. Ex. 1054 et seq. Fonb. Eq. B. 3, ch. 2. Id. book 4, ch. 2, § 1.

[4] Moses v. Murgatroyd, 1 J. Ch. C. 130.

[5] Id. 131.

[6] Craig v. Leslie, 3 Wheat. 563, 577. Doughty v. Bull, 2 P. Wms. 320–323. Yates v. Compton, id. 308.

[7] Crabtree v. Bramble, 3 Atk. 680. Burgesse v. Wheate, 1 W. Black. R. 123. Fonb. Eq. book 1, ch. 6, § 9, and notes.

use at the time the will was made; 4th, not to pass as money, by a general bequest to a legatee; but it will, by a particular description, as so much money to be laid out in land, or by a bequest of all the testator's estate in law and equity.[1]

It may be material to remark, that this rule of considering money as land, or land as money, does not apply, if the special purpose for which the money is directed to be laid out in land, or the land to be converted into money, fail.[2]

There was another rule, which related rather to the sustaining of jurisdiction, that if a court of equity, by reason of any infirmity of a court of law, rightfully obtained jurisdiction of a cause, for the purpose of discovery, it would retain jurisdiction for the purpose of relief. In a recent case in the supreme court of this state, on a bill filed before the code was adopted, and of course governed by the former practice, it was observed by the judge, in delivering the judgment of the court, that there must be some fact appearing on the face of the bill, which either shows that the parties have no remedy at law; or, if there be a remedy at law, there must be some fact apparent which shows that the aid of a court of equity is necessary to render the remedy certain, adequate and effective. If the remedy at law be doubtful or obscure; if it cannot reach the whole mischief, and secure the whole right; if it requires a multiplicity of suits, and the like, a court of equity in general has jurisdiction. Fraud and trusts are subjects with which courts of equity are most frequently called to deal. In cases of fraud, a court of law, in most cases, has a concurrent jurisdiction, but this does not supersede the necessity of a resort to the equity power of the court. And if once the jurisdiction has rightfully attached, it is made effectual for the purposes of complete relief. When a court of chancery has once gained possession of the cause, if it can determine the whole matter, says Lord Nottingham in Parker v. Doe, (2 Ch. Cases, 200, 201,) it will not be the handmaid of other courts, "nor beget a suit to be ended elsewhere." This was the settled doctrine of the court of chancery in this state under the former constitution. When the court had gained jurisdiction of a cause for one purpose, it retained it generally for relief.[3] In like manner it was well settled, that the enlargement of the jurisdiction of courts of law, so as to embrace matters formerly belonging to equity alone, does not oust the latter of

[1] Fonb. Treatise, book 1, ch. 6, § 9, note.
[2] Id.
[3] Conro v. Port Henry Iron Co. 12 Barb. 61, 62. Armstrong v. Gilchrist, 2 J. Cas. 431, per Kent, J. Rathbun v. Warren, 10 John. 587. King v. Baldwin, 17 id. 384.

jurisdiction. It is thus that the subjects of concurrent jurisdiction were constantly increasing.'

But this has ceased to be of any practical importance in this state, since the abrogation of the old forms of remedy, and the consolidation of equity and legal jurisdiction in the same court. The party under the code, can seek such relief as the facts of the case will require, without the danger of being turned over to another court, or to another form of remedy, or of being subjected to any other inconvenience, in case he has misjudged, than to an amendment. If the action be conducted by counsel of industry and learning, and the law be administered by an enlightened tribunal, seeking only for the truth and justice of the case, no reason is perceived why the object sought to be obtained by the action under the code may not be accomplished with safety to all interests, and with reasonable dispatch.

The foregoing observations must suffice as a general introduction of our subject.

In further treating of the subject of equity jurisprudence, we shall bring our discussion under the general head of Accident and Mistake, Account, Fraud and Trust; and shall subjoin an account of the jurisdiction of the court over those peculiarly entitled to its protection, as Infants, Idiots and Lunatics, and Married Women; under which latter head we shall briefly treat of the doctrine of Divorces, which, in this state, has long been an appendage of the jurisdiction of our courts of equity. We shall notice also the jurisdiction of courts of equity in Dower and Partition.

Under the head of Fraud, we shall treat of some of the usual preventive remedies, to which it has given rise, such as Bills of Peace, Quia Timet, Interpleader, the Marshaling Securities, Injunctions, and for Specific Performance.

Under the head of Trusts, the doctrine will be discussed under the usual heads of Express and Implied Trusts: and the various subjects which are usually referable to that head, such as Marriage Settlements, Assignments in Trust, Mortgages, Legacies, Marshaling of Assets and Administration, Charitable Uses, Wills and Testaments, &c., will be brought under review.

We shall also briefly treat of the jurisdiction of courts of equity in Dower, Partition and Partnership, and of proceedings against corporations in equity.

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[1] See per Ld. Eldon, Kemp v. Pryor, 7 Ves. 249, 250. Wesley Church v. Moore, 10 Barb. 258.

CHAPTER I.

OF THE RELIEF AFFORDED BY EQUITY IN CASES OF ACCIDENT AND MISTAKE.

SECTION I.

OF ACCIDENT.

THE remedy which courts of law afforded in cases of accident, being in many cases imperfect and inadequate, gave occasion to courts of equity to exercise jurisdiction over this subject. This jurisdiction is said by Lord Eldon to be very ancient, founded upon a notion, acknowledged until a very late period, that there was no remedy upon a lost bond, as you could not make profert.[1] It was not settled in England, that a deed which had been lost or destroyed by time or accident could be pleaded according to the truth of the case, without profert, until the close of the last century.[2] And in many cases, though a court of law will afford relief, still equity entertains jurisdiction, as affording a more perfect remedy. With us, under the code, it is obvious that the plaintiff may now in the same complaint ask for relief upon both grounds, if the facts be so stated as to justify it.[3] It is nevertheless important that we should have correct notions of the class of accidents against which relief may be obtained.

By accident, said Lord Cowper, is meant when a case is distinguished from others of the like nature, by unusual circumstances.[4] Mr. Maddock adopts the same definition.[5] Mr. Jeremey defines accident, in the sense used in a court of equity, to be "an occurrence in relation to a contract, which was not anticipated by the parties when the same was entered

[1] E. India Co. v. Boddam, 9 Ves. 466.
[2] Read v. Brookman, 3 T. R. 15. Smith v. M'Gowan, 3 Barb. S. C. R. 408.
[3] Code of 1852, § 167.
[4] Earl of Bath v. Sherwin, 10 Mod. R. 1, 3.
[5] 1 Madd. Ch. Pr. 21.

into, and which gives an undue advantage to one of them over the other in a court of law."[1] The first of these definitions is too loose and general, and the other, by confining it to contracts, does not cover the whole ground. It is moreover defective, in not excluding cases of unanticipated occurrences, resulting from the negligence or misconduct of the party seeking relief. The definition given by Mr. Justice Story, in his commentaries, is far more accurate. "By the term accident is intended, not merely inevitable casualty, but such unforseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence, or misconduct in the party."[2]

The most ordinary instances in which this jurisdiction is exercised are those of lost bonds, and negotiable securities, the non-production of which would defeat the action. And in these cases the decree is not confined to a re-execution, but, to avoid circuity of action, extends to payment.[3] The jurisdiction of courts of equity in these cases is more conveniently exerted than that of courts of law; especially when considered as attaching upon several defendants, all liable to the same debt; with mutual remedies against each other, to make a complete and effectual adjustment. In general, a party suing upon a lost instrument should bring before the court all the parties liable, to the intent that the question of fact, upon which the jurisdiction arises, may be decided, not only between the plaintiff and the defendants, but as between the defendants themselves, and that the equities subsisting between them may be properly adjusted. A further reason for entertaining jurisdiction in equity, in cases of this kind, grows out of the facility with which equity can inquire into all the circumstances and grant such indemnity as justice may require.[4] In this state, since the code, the action cannot be entertained for discovery alone in aid of another action.[5] The complaint must demand the relief which the facts stated therein require. And it is presumed that the existence of the instrument, and the circumstances of the loss, must be duly verified by the party, and it must be sworn not to be in his possession or under his control.[6]

The jurisdiction in the case of lost bonds and instruments under seal originates, as has been said, in the doctrine of profert, at law. In the case of negotiable securities, it originates in a different way. An action at law may be brought on such security, without making profert, and complete relief

[1] Jeremys' Eq. Jur. B. 3, pt. 2, Introd. p. 358.

[2] Story's Eq. Jur. § 78.

[3] Adams' Equity, 167, 337.

[4] East India Co. v. Boddam, 9 Ves. 466.

[5] Code, § 389, and see Whitfield v. Fausatt, 1 Ves. 292, 393. Bromley v. Holland, 7 id. 19, 20.

[6] Adams' Eq. 167.

may be granted in that court. But if the instrument be negotiable, and be lost before it is dishonored, it may pass into the hands of a *bona fide* holder, against whom no defense can be made. A court of law, too, requires that the plaintiff suing upon negotiable paper should produce it at the trial, and deliver it up. This he cannot do if it be lost. And hence equity will entertain jurisdiction and grant relief, on a proper indemnity being given.[1] If the security be not negotiable, it was said by Sir William Grant, in Mossop v. Eadon,[2] that its loss will not prevent the creditor from recovery at law, and will not therefore create a jurisdiction in equity. But this doctrine seems to have been overruled in a subsequent case, in the king's bench.[3] In that case the indorser of a bill of exchange having lost the same after it became due, sought to recover against the drawer, in an action at law, on tendering an indemnity, but the court held he could not recover at law. Lord Tenterden said it was the duty of the holder, on receiving payment, to deliver up the bill, and the drawee was not bound to pay unless the bill was delivered up to him. His lordship in conclusion said, that the holder was not without remedy. He may tender sufficient indemnity to the acceptor, and if it be refused he may enforce payment thereupon, in a court of equity. The English cases are not free from contradiction, but the present rule seems to be as stated by Lord Tenterden, above.[4] The supreme court of New-York, in 1824, held, that an action at law could not be sustained on a negotiable promissory note papable to bearer, on proving its loss, though such loss happened after it became due. If the note were *destroyed*, they thought an action at law could be maintained, and so if it was not negotiable. They said the appropriate remedy was in equity, which alone could afford the defendant adequate indemnity against future liability.[5] The doctrine that the maker was not bound to pay unless the bill or note was given up to him as his voucher; or upon tender of ample indemnity against any future liability, was repeated in a later case.[6] Rowley v. Ball was decided *before*, and Smith v. Rockwell *after*, the R. S. enacted that, in any suit founded upon any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defense of any suit, if it appears on the trial that such note or bill was lost while

[1] Macartney v. Graham, 2 Sim. 285.

[2] 16 Ves. 43.

[3] Hansard v. Robinson, 7 Barn & Cres. 90.

[4] See Walmesly v. Child, 1 Ves. sen. 338, 346, 347. Leftly v. Mills, 4 T. R. 170. Toulmin v. Price, 5 Ves. 238. Ex parte Greenway, 6 id. 812. Mossop v. Eadon, 16 id. 430. 1 id. 34. 5 id. 338. 6 id. 112, Davies v. Dodd, 4 Price, 176 Chitty on Bills, 8th ed. 290, and notes.

[5] Rowley v. Ball, 3 Cowen, 303.

[6] Smith v. Rockwell, 2 Hill, 482.

it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given, on such trial; and notwithstanding such note or bill was negotiable, such party shall be entitled to recover the amount due thereon, as if such note or bill had been produced.[1] This statute only extends to the remedy, and applies only to negotiable paper.[2]

The supreme court of the United States sustained an action, without evidence of the *destruction* of the note, there being undoubted evidence of its loss, and no motive or inducement to withhold it.[3]

If the party *voluntarily destroy* a note, he will not be permitted to give secondary evidence of its contents, and his remedy thereon is gone It is only when the instrument is lost, without a fraudulent design, that he is permitted to recover thereon.[4]

A recent case in the court of appeals of the state of New-York may be referred to this head of *accident*, although, perhaps, it would not be out of place under the head of *mistake*.[5] The plaintiff, in Nov. 1843, entered into a lease of a tavern stand in the city of Rochester, from the defendants, for eight years from the first day of April thereafter, for the annual rent of one thousand dollars, payable quarterly; the lease containing the usual covenants for the payment of rent. After the execution of the lease, and before the commencement of the term or the entry of the lessee, the premises were destroyed by fire, without the fault of either party. The landlord insisted on the payment of the rent, and brought an action to recover the same. The plaintiff filed his bill in chancery to restrain that action, and praying to reform the lease, by inserting in it a clause providing *for the determination of the lease and the covenants therein, on the destruction of the premises by fire*, and upon such correction he prayed for relief against the said action. The ground of the bill was, that the parties agreed, at the time the contract was consummated, that the lease should contain that clause, and that the same had been inadvertently omitted by the scrivener in preparing the lease, and the omission was not discovered by the parties when the lease was executed. As claimed by the plaintiff, this was an *accidental* omission of a material part of the contract, without the fault of the plaintiff. The contract as made excused the plaintiff from the payment of rent, on the contingency which had happened, but, as reduced to writing and signed, it bound him to pay rent during the term, though the

[1] 2 R. S. 406, § 75.

[2] Smith v. Rockwell, 2 Hill, 484. Blade v. Noland, 12 Wend. 173.

[3] Renner v. Bank of Columbia, 9 Wheaton, 596.

[4] Blade v Noland, 12 Wend. 173.

[5] Wood v. Hubbell, MS. June 7, 1853.

premises were destroyed by fire. The court below dismissed the bill, because the agreement was not sufficiently proved; but the court of appeals differed from them on that point, and reversed the decree of the court below, and ordered the instrument to be reformed according to the prayer of the bill. The omission by the scrivener of the material part of the agreement was *accidental*, and without the fault of either party.

If the form of a deed or conveyance is, by accident or mistake, contrary to the intention of the parties, in their contract, on the subject, a court of equity will interfere to prevent one party from taking an unfair advantage thereof.[1] So a court of equity will supply words omitted in a deed, in order to give effect to the intention, if it be clear and apparent. Words of inheritance have been thus inserted, so as to convert a life estate into a fee.[2]

The plaintiff placed his son with an attorney and gave £120 with him, and articles were made and executed by which it was provided, that in case the attorney died within a year, that then £60 of the money should be returned. It happened that the attorney died within three weeks after sealing the articles, and payment of the money. The court, notwithstanding the parties had provided for accidents to a certain extent, decreed that 100 guineas should be paid back. In this case the death of the attorney was treated as an *accident;* and as the substantial part of the consideration for the sum deposited had failed, equity required that 100 guineas of the money should be refunded.[3] This decision, the master of the rolls, (Lord Kenyon,) in Hale v. Webb, (2 Bro. Ch. R. 80,) observed, "carried the jurisdiction as far as could be." At law it has been held, that a partial failure of consideration of a note given on the purchase of real property is not inquirable into in an action upon the note, but the party must seek relief in equity.[4] The cases on this point are in some measure conflicting.

The ground on which equity affords relief against penalties is referred to this head of *Accident.* It relieves against payment at the day, by requiring that interest should be paid from the time of the default.[5] The common case of a bond, conditioned for the payment of money, secured by a mortgage, when the title of the mortgagee becomes absolute at law, depends on the same principle, but will more properly be con

[1] Chamness v. Crutchfield, 2 Iredell's Eq. Rep. 148.

[2] Higginbotham v. Burnet, 5 John. Ch. R. 184. Horry v. Horry, 2 Desaus. 115. Desell v. Casey, 3 id. 84.

[3] Newton v. Rose, 1 Vern. 460. Fonb. Eq. B. 1, ch. 5, § 8.

[4] Greenleaf v. Cook, 2 Wheat. 13.

[5] Grimstone v. Bruce, 2 Vern. 594.

sidered under the head of Mortgages. Lord Hardwicke laid down the rule thus :[1] "Equity will relieve against almost all penalties whatsoever; against non-payment of money at a certain day; against forfeitures of copyholds. But they are all cases where the court can do it with safety to the other party; for if the court cannot put him into as good condition as if the agreement had been performed, the court will not relieve." So it is a standing rule of the court, that a forfeiture shall not bind, when a thing may be done afterwards, or any compensation may be made for it. Forfeitures are odious in law. Courts of law, circumscribed as their jurisdiction is, struggle against them. If the landlord does any thing receiving rent for example, relief may be had, without the necessity of coming to equity.[2] Unless it is plain that full compensation can be given, so as to put the other party in the same situation precisely, a court of equity ought not to act; for such jurisdiction would be arbitrary.[3]

It is on this principle of compensation that equity sometimes relieves against the strict performance of conditions *subsequent*.[4] If such condition becomes impossible, by the act of God, or of the law, or of the obligee, &c., the estate will not be defeated or forfeited.[5] The rule is the same where the condition subsequent is unlawful.[6]

The relief which equity affords in the case of confusion of boundaries, is referable to the head of Accident. Where lands have become mixed or confounded without the fault of the plaintiff, equity will appoint a commission to settle the boundaries, and, upon confirming the report, make a proper decree between the parties.[7] From the simplicity of our conveyances, and the recent settlement of the country, cases requiring this relief will not be of frequent occurrence.

Having shewn under what circumstances equity will relieve against accidents, it may be proper to refer to some of the cases in which no relief will be granted. It has been repeatedly held, that it will not relieve against penalties in the nature of stipulated damages.[8] In matters of positive contract, as where the tenant covenants to pay rent, or to repair during the term, and to leave the premises in as good condition at the end of the

[1] Rose v. Rose, Amb. 332.

[2] Cage v. Russell, 2 Ventris, 352. Sanders v. Pope, 12 Ves. 290, 291. Jackson v. Allen, 3 Cowen, 220. Clark v. Cummings, 5 Barb. 339. Northcote v. Duke, Amb. 511.

[3] Sanders v. Pope, 12 Ves. 291. Davis v. West, id. 475.

[4] Popham v. Bamfield, 1 Vern. 83.

[5] Co. Lit. 206, b.

[6] Perkins, § 139.

[7] Norris v. Le Neve, 3 Atk. 82.

[8] Skinner v. Dayton, 2 J. Ch. R. 526. Woodard v. Gyles, 2 Vern. 119. Rolfe v. Peterson, 6 Bro. P. C. 470.

term as at its commencement, and the premises be accidentally destroyed by fire, equity affords no relief. The reason is that the tenant might have provided for this contingency in his contract, and having made no such provision, he is liable on his covenant for rent, though the premises be destroyed by fire, and cannot be relieved in equity.[1] In Wood v. Hubbell,[2] the destruction of the building by fire, after the date of the lease, but before the commencement of the term, was held by the supreme court to absolve the lessee from the payment of rent; but the court of appeals differed from the supreme court on this point, and the case was decided on other grounds.[3]

A court of equity will not afford relief against an accident which has happened in consequence of the gross negligence of the party seeking relief. There is, says Chancellor Kent, no such head of equity jurisdiction.[4]

Although equity in many cases relieves to prevent the *divesting* of an estate, yet a condition precedent, to be performed before an estate will vest, must be literally performed; and the court never interferes to *vest* an estate where it will not vest in law,[5] unless the party who was to take the estate, on non-performance of the condition, had used an indirect practice or contrivance to prevent its performance.[6]

Where an estate was devised, upon condition that if the first devisee should refuse or neglect to comply with the condition; viz. within six months after the testatrix's death, to release all demands upon her as executrix of A. or otherwise established, with a limitation over; this was held to be a *conditional limitation*, and a failure in not executing the release was held not to be relievable.[7]

Equity grants no relief against forfeiture under a by-law of an incorporated company providing that the members shall receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after notice sent; and this, notwithstanding the lapse arose from ignorance of the call, from accidental circumstances, and absence from town when the notice was sent.[8] This refusal was put upon the ground, that

[1] Monk v. Cooper, 2 Str. 763; S. C. Ld. Ray. 1477. Balfour v. Weston, 1 T. R. 310. Doe v. Sandham, id. 705, 710. Hallet v. Wylie, 3 John. R. 44. Gates v. Green, 4 Paige, 355. Willard v. Tillman, 9 Wend. 358.

[2] Wood v. Hubbell, 5 Barb. 601.

[3] See ante and MS.

[4] Penny v. Martin, 4 J. Ch. R. 569. 1 Fonb. Eq. B. 1, ch. 3, § 3. Marine Ins. Co. v. Hodgson, 7 Cr. 336.

[5] Cary v. Bertrie, 2 Vern. 333. Popham v. Bamfield, 1 id. 83. 3 Chan. Cas. 129. 2 Freeman, 220.

[6] Cary v. Bertrie, 2 Vern. 344.

[7] Simpson v. Vickers, 14 Ves. 341.

[8] Sparks v. Liverpool Water Works Co. 13 Ves. 428.

the accident arose partly from a want of proper precaution on the part of the stockholder, and also that compensation could not be made, and that it would be against sound policy to allow a writ to be brought to be relieved against any default. A company could not carry on its business upon such terms. The same rule of refusing relief applies, it seems, to subscribers to a government loan, neglecting to make a further payment, and thus forfeiting the installments already made.[1]

Relief will not be granted against a forfeiture of a lease, for *willful* waste, though it admits of compensation:[2] as where the tenant grants leases, works a quarry, cuts down timber, &c. against repeated admonitions.

Nor will a court of equity relieve, where a reference has been made to arbitration, and the judgment of the arbitrators is not given in the time and manner, according to the agreement. The court cannot substitute themselves for the arbitrators and make the award.[3] So, where there is a contract for a sale at a price to be fixed by an award during the life of the parties, and one of them dies before the award is made, the contract falls; and equity will not enforce it upon the ground of accident. The death of the party is a revocation of the award, and the chancellor said there is no instance, where the medium of arbitration or umpirage, resorted to for settling the terms of a contract, having failed, equity has assumed jurisdiction to determine, that though there is no contract at law, there is a contract in equity.[4]

Nor will a court of equity relieve against accidents which prevent voluntary dispositions of estates.[5] As where a testator promised to make a further codicil to his will, and to give to the plaintiff £15 per annum more than he had already, but died without doing so.[6] A legatee has no independent right to a legacy, until consummated by law, and can take only by the bounty of the testator. He has no equity that can be enforced against the estate, because the testator has failed to make him a subject of his bounty.

The cases where equity will relieve, and where it will not relieve, on the ground of accident, may be greatly extended. Many of them will be considered under the head of mistake. Indeed, the line which separates the two classes of cases is often nearly imperceptible, and for all practical purposes they may, in many instances, be as well considered under one head as the other.

[1] 13 Ves. 435.

[2] Thomas v. Porter, 1 Ch. Cases, 95. Prec. in Ch. 568, 574. Pearley v. Somerset, 1 Str. 447. Smith v. Parkhurst, 3 Atk. 141.

[3] Cooth v. Jackson, 6 Ves. 34.

[4] Blundell v. Bretargh, 17 Ves 241, 242.

[5] Whiton v. Russel, 1 Atk. 449.

[6] 4 id

From the foregoing review, it would seem, that to entitle a party to relief on the ground of accident, the plaintiff must establish a clear right, which cannot otherwise be enforced, in a suitable manner; or that he will be subjected unjustly to loss, without blame or misconduct on his own part; and that his equity is superior to that of the party against whom he seeks relief.[1]

SECTION II.

OF MISTAKE.

A CORRECT notion of what is understood by a court of equity, by the term *mistake*, is indispensable to a just understanding of the cases which have been decided on this subject. Dr. Webster defines mistake thus: "An error in opinion or judgment; misconception. 2, a slip; a fault; an error." This definition is too narrow, as it does not exclude the idea of the error being intentional. Mr. Jeremy defines it to be "that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done."[2] Mr. Justice Story says, "it is sometimes the result of accident in a large sense; and as contradistinguished from it, it is some unintentional act, or omission or error, arising from ignorance, surprise, imposition or misplaced confidence."[3] This latter is the more comprehensive definition of the two.

The usual division of this subject is into, 1st, mistake of law; and 2d, mistake of fact. In some of the cases a distinction has been sought to be made between *ignorance* of the law and *mistake* of the law, and it has been insisted, that in the first case the party is remediless, and the latter he is not.[4] An examination of the cases will show that no such distinction exists. *Ignorantia facti excusat, ignorantia juris non excusat*, is a well known maxim.[5] This maxim is alike applicable to courts of law and courts of equity.[6] A party may be relieved in equity where the mistake he has committed has been the result of his ignorance of a fact

[1] Story's Eq. § 109. Madd. Ch. Pr. p. 49, &c.

[2] Jeremy's Eq. Juris., book 3, ch. 2, p. 358.

[3] Story's Eq. Juris. § 110.

[4] Lawrence v. Beaubien, 2 Bailey's S. C. R. 623, and per Senator Paige in Champlin v. Laytin, 18 Wend. 423. Hull v. Reed, 2 Barb. Ch. R. 505.

[5] Br. Maxims, 190.

[6] Bilbie v. Lumley, 2 East, 469.

material to the regulation of his conduct, but not if it has been the result of *ignorance* or *mistake* of the law.

The case which is generally quoted as establishing the distinction between *ignorance* of the law and *mistake* of the law, is Lansdowne v. Lansdowne, decided by Lord Chancellor King.[1] It is very meagerly reported. From the report it appears, that the second of four brothers died, and the eldest and the youngest both claimed his estate. They referred the question to a schoolmaster, who decided that the youngest was entitled to the property, because lands could not ascend. Upon this, the parties agreed to divide the estate between them, and the eldest brother executed a release. The chancellor decreed that the deed should be delivered up, "being obtained by mistake and misrepresentation." The facts are so briefly stated, that it is impossible to say, with certainty, on what ground the decision proceeded. If there was any intentional misrepresentation, either about the facts or the law, that would be a proper ground for affording relief; and it is stated in a report of the case, (2 Jac. & Walk. 205,) that the complainant alleged, in his bill, that he had been surprised and imposed upon by his brother and the school master. In the report by *Moseley*, Lord Chancellor King is made to say that the maxim of law, *ignorantia juris non excusat*, was in regard to the public; that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases. Mosley is not a book of very high authority. Lord Mansfield said it was a book not to be quoted.[2] Bronson, J., intimates that it is much more probable that the case turned on the ground of surprise and imposition, than the chancellor made use of the language imputed to him.[3]

The cases relied on to sustain the doctrine that courts will relieve, in cases of mistake in law, will be found, on a critical examination, to fall short of that position. In every instance, they are either too loosely reported to be relied on, or they contain some fact which justified the decision, without disturbing the principle, that every man in the full enjoyment of his mental faculties, and in the absence of all undue influence, is presumed to know the law of the land. They are most of them reviewed by Bronson, J., in Champlin v. Laytin,[4] where the whole subject has been fully considered. The same learned judge held that the distinction attempted to be made between *ignorance* and *mistake* of the

[1] Lansdowne v. Lansdowne, Mose. 364.
[2] 5 Burr. 2629. 3 Anstr. Rep. 861.
[3] Champlin v. Laytin, 18 Wend. 414.
[4] Id. 415.
[5] 1 Kent's Com. 493.

law, and that in the latter case, though not in the former, relief might be granted, rested on no solid foundation.

The case of Hunt v. Rousmanier,[1] has been relied on to uphold the doctrine under review. A brief examination of that case will not be out of place on this occasion. The bill, in that case, stated that the plaintiff loaned to the defendant's intestate two sums of money, 1450 dollars and 700 dollars, for which his promissory notes were given; and as collateral security, a power of attorney authorizing the plaintiff to execute a bill of sale of two vessels, the *Nereus* and the *Industry*, to himself or any other person; and in case of loss, to collect the money which should be due on a policy, by which said vessels and their freight were insured. The instrument contained a proviso, that the power was given as a collateral security of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the surplus to the said Rousmanier. The bill then charged that the said Rousmanier died insolvent, having paid only 200 dollars on said notes. The plaintiff gave notice of his claim, took possession of the vessels on their return from sea, and offered the intestate's interest in them for sale. The respondents forbade the sale; and the bill was brought to compel them to join in it. The amended bill further stated, that it was agreed between the parties, that *Rousmanier* was to give a specific security on the vessels, and offered to give a mortgage; that counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken, in preference to a mortgage; that the powers were accordingly executed, *with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a mortgage.* To this bill there was a demurrer; which was sustained by the circuit court of Rhode Island, and the bill dismissed.[2] From this decision the plaintiff appealed to the supreme court of the United States, where the decree of the circuit court was reversed, the proceedings remitted, and leave given in the court below to withdraw the demurrer and answer the bill.[3] Chief J. Marshall sustained the principle, that courts of equity grant relief in cases of fraud and mistake; and that, in general, the mistakes against which a court of equity relieves, are mistakes of fact. He threw some doubt over the case of Lansdowne v. Lansdowne, in *Moseley*, before referred to, and con-

[1] Hunt v. Rousmanier, 8 Wheaton, 174.

[2] Hunt v. Rousmanier's Adm'r, 2 Mason's R. 244.

[3] Hunt v. Rousmanier, 8 Wheaton, 174.

cluded by saying, "We find no case which we think precisely in point, and are unwilling, when the effect of the instrument is acknowledged, to be entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief.

The case being remanded to the circuit court, was there tried, on the answer of the defendants; and that court decreed, that the plaintiff was not entitled to the relief sought, and dismissed the bill.[1] On appeal, the case came again before the supreme court, and the decree of the circuit court was affirmed.[2] Washington, J., in pronouncing the opinion of the court, says: "The question then is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something very peculiar in their character." He then adverts to the case of Lansdowne v. Lansdowne, and remarks: "Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported, upon a principle not involved in the question we are examining." It cannot be denied, that some of the positions of Chief Justice Marshall, when the case was first before the court, as reported in Wheaton, are greatly shaken by the learned and elaborate judgment of Mr. Justice Washington, in which all seemed to concur. The case itself cannot be quoted as an authority for relieving against mistakes of law, nor for the existence of a distinction between *ignorance of the law, and mistake of the law.*

The doctrine that parol evidence is inadmissible, to show a mistake in law as a ground for reforming a written instrument founded on such mistake, is the settled doctrine of Connecticut.[3] Civilians are divided on the question whether money paid under a mistake of law, is liable to *repetition.* But it is the settled doctrine of Westminster hall, that money paid with a full knowledge of the facts cannot be recovered back, on the ground that the party was ignorant of the law.[4]

The principles of the common law have been followed more closely in this than they have in some of the other states; and our courts have never held but one language on the subject. Chancellor Kent, in an

[1] Hunt v. Rousmanier, 3 Mason s R. 294.

[2] S. C. 1 Peters, 1. And see Bank U. S. v. Daniel, 12 Peters, 32.

[3] Wheaton v. Wheaton, 9 Conn. 96.

[4] Bilbie v. Lumley, 2 East, 469. Lowry v. Bourchier, Douglas, 467, 471, per Buller, J. Stevens v Lynch, 12 East, 38. Brisbane v. Davies, 5 Taunt. 144.

early case nearly forty years ago,[1] said it was a settled principle of law and sound policy, that a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts. He added, that ignorance of the law was a very dangerous plea, whether we apply it to the rules of civil conduct, or to duties of natural and moral obligations. And he denied relief, on the ground that the plaintiff was only under a mistake in point of law, which mistake was not produced by any fraud of the defendant. In a later case,[2] he says: "Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law: every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." And, in a subsequent case,[3] he asserts the same doctrine. And the supreme court, in 1824,[4] held that money paid under a mistake of law could not be recovered back. The learned judge who delivered the opinion of the court said: "Although there are a few *dicta* of eminent judges to the contrary, I consider the current and weight of authorities as clearly establishing the position, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back, upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of law; and it shall be considered a voluntary payment." The general doctrine that a mistake in law could not be made a ground of relief, was held by a learned judge in a recent case.[5]

After a learned review of many of the cases on the subject, an eminent judge[6] says: "It is impossible to foresee all the consequences which would result, from allowing men to avoid their acts and annul their contracts, on the plea that they did not understand the law. Who could tell what titles would stand, or what contracts could be enforced, if grantors and obligors were at liberty to set up this plea? Who would venture to enter into stipulations with another, if, after having dealt fairly in relation to the facts of the case, the validity of the contract still depended on the legal knowledge of the opposite party? And what

[1] Shotwell v. Murray, 1 J. Ch. R. 316.
[2] Lyon v. Richman, 2 John. Ch. R. 51. Storrs v. Baker, 6 John. Ch. R. 169. Clark v. Dutcher, 9 Cowen, 674, 681.
[5] Gilbert v. Gilbert, 9 Barb. 532. Arthur v. Arthur, 10 id. 9–16, per Hand, J.
[6] Per Bronson, J., Champlin v. Laytin, 18 Wend. 417.

possible reason can there be for indulging the plea of ignorance in civil cases, when it is wholly disregarded in criminal trials, where liberty and life are at stake? Should we sanction this doctrine under the notion of administering equity in a hard case, it could not, I think, fail to open the flood-gates of litigation, and work the most mischievous consequences in the administration of justice."

In a well considered case in Massachusetts the expression, ignorance of the law, was held to have reference to the law of one's own country. A man is not presumed to know the law of another state, or nation, and therefore ignorance of the law of a foreign government is ignorance of a *fact;* and consequently money paid by mistake, through ignorance of the law of another of the United States, may be recovered back.[1] Such ignorance, on the same principle, is, in a proper case, relievable in equity.

On the question whether a party is relievable for mere error in law, the late Chancellor Walworth has expressed no clear or decided opinion.[2] The weight of authority is greatly adverse to such power, unless surprise, fraud or some other circumstance intervenes.

One of the most common cases put to illustrate the doctrine is, where two are bound by a bond, and the obligee releases one, supposing, by mistake of law, that the other will remain bound. In such a case the obligee will not be relieved, in equity, upon the mere ground of his mistake of the law. If there has been no fraud or imposition, or misplaced confidence on either side, there is no reason why the obligor, to whom the release was given, should not insist on his legal right; and it is not inequitable for the other obligor to insist on his legal rights.[3]

There is a class of cases where the court appears to have been governed by mixed considerations, and to have granted relief apparently for a mistake of the law. But when the cases come to be more fully and critically examined, it will be seen that an ignorance of facts, as well as law, or misplaced confidence or surprise, has occasioned the act sought to be relieved. Thus, in an often quoted case,[4] where a daughter of a freeman of London accepted of a legacy of £10,000 left her by her father, who recommended it to her to release her right to her orphanage part, which she did release accordingly. Upon a bill afterwards filed by her against

[1] Havens v. Foster, 9 Pick. 112. The whole subject of mistake and ignorance of the law is elaborately examined by counsel in this case. And see Cockerell v. Cholmeley, 1 Rus. & My. 418.

[2] Crozier v. Rice, 7 Paige, 137. Hal v. Reed, 2 Barb. Ch. R. 500.

[3] 1 Fonb. Eq. B. 1, ch. 2, § 7. Harman v. Carner, 4 Vin. Ab. 387, pl. 3. 1 Mad. Ch. 60.

[4] Pusey v. Disbouvre, 3 P. Wms. 316.

her brother, the executor, the release was set aside, and she was restored to her orphanage part, which amounted to £40,000. Lord Chancellor Talbot, in deciding the case, expressed the opinion that no fraud was committed by the brother. His Lordship said: "It appears the defendant did inform the daughter, that she was bound either to waive the legacy given by her father, or to release her right by the custom; and so far she might know, that it was in her power to accept either the legacy, or orphanage part; but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprised of this, then, and not till then, she was to make her election, which very much alters the case; for probably she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto before she waived it, and accepted the legacy." It is thus obvious, that it was not upon the sole ground of the plaintiff's *ignorance* of the law that the decree proceeded, but her ignorance of an important fact, essential to be known, before she could intelligently execute her election. Though her brother practiced no fraud upon her, yet she relied upon him for information, which was not communicated. It was thus a case in which misplaced confidence, mingled with an ignorance of both law and fact. The case does not conflict with the current of authority on this subject.

Many of the cases on this subject arise out of the compromise of family controversies, and should not be disturbed by the courts on the mere ground that either of the parties acted in ignorance of the law, or was mistaken in its effect. But if a party obtaining a release has an undue advantage over the other party, if the parties did not stand upon equal ground, if the releasor was led by his necessities, or by undue influence or surprise, as well as ignorance of his rights, to relinquish his interest in the estate to which he is entitled as heir or devisee, relief will be granted. Thus, in a recent case,[1] the testator, after giving some inconsiderable legacies, bequeathed the bulk of his large estate to his executors "in trust for such purposes as they consider promises to be most beneficial to the town and trade of Alexandria; if any difficulty occurs in construction as to any of my bequests, R. J. Taylor is specially charged to give said construction." The executors, after the death of the testator, but without any actual fraud, obtained from the nephew and heir at law of the testator a release of his interest in the estate, and as

[1] Wheeler v. Smith, 9 How. 55.

a compromise of his claim to the same, in consideration of twenty-five thousand dollars. The heir filed his bill to set aside the legacy as void on account of the objects being too indefinite and uncertain, and to set aside the release and compromise as being given under a mistake as to the validity of the bequest, and for other grounds. The bill was filed in the circuit court of the District of Columbia, and detailed the circumstances under which the release was obtained. The defendants demurred to the bill. The circuit court sustained the demurrer and dismissed the bill, and the complainant appealed to the supreme court. On the appeal, the court held the residuary bequest void, the effect of which decision was to devolve the estate on the complainant as heir at law, unless the release and compromise were operative. On this branch of the case the court say, "The complainant had been prodigal in his expenditures, and notwithstanding the provisions for his support, which had been made for him by his uncle, he was without means and embarrassed. In the interview which led to the compromise, he expressed the opinion that the bequest was void, and declared that he should try its validity by legal proceedings." Mr. Taylor, one of the executors, was a distinguished lawyer, a man of high standing, and in whom the complainant reposed the greatest confidence; he represented to the complainant that he had sundry written opinions of counsel in favor of the legal validity of the residuary devise, which he offered to shew to him. His conversation conveyed to the complaintant, "the clear and distinct impression that there was but one opinion among the lawyers consulted, and that they were unanimous in favor of the validity of the devise." The complainant asked Mr. Taylor to state *his* opinion on the subject. He observed that the complainant should not have asked him, but his opinion was, "that the devise in question was a legal and valid disposition of the residue of the estate." At the same time he admitted that, in Pennsylvania, such a devise would not be good; but that it was good under the old law of Virginia.

The complainant alleged that he had no settled views of the legal question, and being disheartened by the circumstances under which he was placed, he yielded to the compromise. He had but little time for reflection, and none to advise with counsel; and at last he came to the conclusion to consider the devise valid, and take what he could for a release

Under these circumstances, the complainant agreed to the compromise. It stated the residuary devise, and that its validity had been controverted by the complainant. That the executors, taking on themselves the burden of the execution of said will, and of the trusts aforesaid, and the said complainant, to avoid the expense of litigation, and finally to settle and adjust all doubts and difficulties which might arise on the

effect of said will, so as to leave the executors to execute the same without delay or impediment, have agreed on the following terms of compromise: The terms are then set out, by which, among other things, the complainant released to the executors all his claims in law and equity to the estate, real and personal, devised and bequeathed, or intended to be devised or bequeathed, by the said testator by his said will, &c., &c. The learned judge then proceeds: "The complainant, it seems, had studied law, but it is manifest, from the facts before us, that he was but little acquainted with business, was an inefficient and dependant man, easily misled by those for whose abilities and characters he entertained a profound respect. From the high character of the executors, no one can impute to them any fraudulent intent in this transaction. Looking to what they considered to be the object of the testator, they felt themselves authorized, if not bound, to effectuate his purposes by making this compromise with his heir at law. They had no personal interest beyond that which was common to the citizens of Alexandria. And we admit that they may have acted under a sense of duty from a misconception of their power under the will.

"But in making the compromise, the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors. Having the confidence expressed in the validity of the devise, they could hardly have felt themselves authorized to pay to the complainant twenty-five thousand dollars for the relinquishment of a pretended right. Nor could they have deemed it necessary, in the agreement of compromise, substantially to constitute him the donor of the munificent bequest to the town and trade of Alexandria.

"We are to judge of this compromise by what is stated in the bill, the facts being admitted by the demurrer. And it appears to us that the agreement, under the circumstances, is void. It cannot be sustained on principles which lie at the foundation of a valid contract. The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely and with a proper understanding of his rights."

It is quite clear that the decision of this case rests on other ground than the mistake of the complainant as to the legal validity of a legacy. He was not informed of the value of the estate embraced in the residuary bequest. Here was an *ignorance of a fact*, known to the one party and not to the other. It is hardly probable that he would, for the consideration of $25,000, have released his claim to an estate worth five times that amount, had he possessed the same knowledge which the executors enjoyed. Here was also a misplaced confidence in the executors.

A distinction was suggested by Lord Macclesfield,[1] between a release, where the party releasing was ignorant of his right, or, if his right was concealed from him by the person to whom the release is made, and the release of a party having right, intimating that in the latter case the release was valid, and in the former it might be set aside. If, indeed, the releasee be guilty of fraud in obtaining the release, it is quite plain equity will relieve. But there is no foundation for the other distinction. If two parties are contending in court, and one releases his pretensions to the other, there can be no color to set aside the release, because the man who made it had a right; for by the same reason there can be no such thing as compromising a suit, nor room for any accommodation; every release supposes the party making it to have a right. But this can be no reason for its being set aside, for then every release would be avoided.[2] An agreement upon a supposition of a right, though it may afterwards come out that the right was on the other side, is binding, and the right shall not prevail against the agreement of the parties.[3]

If there be a compromise of a doubtful right, fairly made between the parties, its validity cannot be made to depend upon any future adjudication of the same question. A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind.[4]

In some of the states, courts of equity have not followed the rule of the English courts and of this state, but have been more indulgent in granting relief, from a mistake of law as well as of fact. There are cases in South Carolina, Kentucky and Maryland to this effect.[5] But the general rule in this country undoubtedly is, that every man is to be charged at his peril with a knowledge of the law; and the courts cannot undertake

[1] Cann v. Cann, 1 P. Wms. 727.

[2] Id.

[3] Stapilton v. Stapilton, 1 Atk. 10.

[4] Lyon v. Richards, 2 J. Ch. R. 60. Shotwell v. Murray, 1 J. Ch. R. 516.

[5] Lowndes v. Chisden, 2 M'Cord's Ch. R. 455. Hopkins' Ex'r v. Mazyck, 1 Hill's Ch. R. 251. Drew v. Clerck, Cook 374. Fitzgerald v. Peck, 4 Litt. 125. Lamat v. Rowley, 6 Harr. & John. 500, and see cases collected in C. & H. Notes, 1483, 4. Gilbert v. Gilbert, 9 Barb. 534. Arthur v. Arthur, 10 id. 9. Mathews v. Terwilliger, 3 id. 50. Dupre v. Thompson, 4 id. 279.

to relieve parties from their acts and deeds, fairly done on a full knowledge of facts, though under a mistake of the law.

It remains to consider how far, and under what circumstances, equity will relieve in case of ignorance, or mistake of fact. Although there may be a difference between *ignorance* of a fact, and *mistake* of a fact, when closely considered, yet they are generally used as equivalent expressions in legal discussions. In general it may be said, that the *fact* mistaken must be material to the contract, or other matter affected by it, and the party asking relief must make his complaint with reasonable diligence. In this, as in other matters, the maxim applies *vigilantibus non dormientibus jura subveniunt.*[1]

Courts of equity sometimes give relief in cases of mutual mistakes, unaccompanied by fraud, when the property which one party intended to sell, and the other intended to buy, did not in fact exist; or where the subject matter of the sale and purchase is so materialy variant from what the parties supposed it to be, that the substantial object of the sale and purchase entirely fails.[2] Where land is sold at a certain price by the acre, or foot, and it turns out that by the mutual mistake of the parties there is a considerable deficiency in the quantity, courts of equity have so far interfered in some cases as to relieve the purchaser from the payment, for the deficiency. But, even in such a case, a slight variation in quantity will not afford a ground for the interference of a court of equity to correct the mistake.[3]

Where the consideration of a covenant to pay an annuity, was the conveyance to the covenantor of a tract of land on the right bank of the Ohio river, stated *to embrace a coal mine*, and the sole inducement to the purchase was the supposed existence of the coal mine, and it was finally ascertained that no coal mine was embraced within the bounds of the deed, equity enjoined perpetually a prosecution at law, to recover the annuity.[4] But the court will not interfere, where the instrument itself is such as the parties designed it to be. If the parties voluntarily choose to express themselves in the language of the deed, they must be bound by it.[5] It is otherwise upon proof of fraud, mistake or surprise.[6]

But if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside the contract,

[1] 2 Inst. 690. Broom's Maxims, 692.

[2] Per Walworth, Ch., Marvin v. Bennet, 8 Paige, 321; S. C. in error, 26 Wend. 169.

[3] Id.

[4] Dale and wife, ex'rs of Fulton, v. Roosevelt, 5 J. Ch. R. 174; S. C. in error, 2 Cowen, 129.

[5] McEldery v. Shipley, 2 Maryl. R. 25.

[6] Id.

that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole; or that the other shall be obliged to sell the whole, for what he intended to be the price of part only. On the other hand, if both understood the whole was to be conveyed, it must be conveyed.[1] In this case there had been an innocent mistake of the parties, as to the extent of the thing purchased.

So where A. purchased an estate of B., which in fact was the estate of A., A. was allowed, on the ground of mistake, to have the purchase money refunded, though there was no fraud in B., who apprehended he had a right to the estate.[2]

On the same principle, where a legatee had received a legacy and a year's interest, and given a receipt in full for the legacy and interest, on shewing that the legacy was payable a year after the death of the testator, and not on the marriage of the legatee, which happened long afterwards, and that it was by mistake the whole interest was discharged when only a part was paid; the court relieved against the receipt, and directed the balance to be paid, although in form cut off by the discharge.[3]

The same principle is illustrated by another very hard case: thus, a mortgage came to an executor, who received the mortgage money and paid it over to his testator's creditors. Afterwards, it appeared that the mortgage had been satisfied in the testator's lifetime. A bill was filed to be relieved for this overpayment, and relief was decreed, though the money had been paid by the executor in satisfaction of debts of the estate, for which there were no other assets to pay. And the executor was driven to sue the creditors, to whom he had, through mistake, paid.[4]

To entitle a party to relief in such cases, the fact must not only be *material*, but must be such that he could not, with reasonable diligence, have obtained knowledge of the fact. Where there is neither accident nor mistake, misrepresentation nor fraud, equity affords no relief to a party, on the ground that he has lost his remedy at law, through mere ignorance of a fact, the knowledge of which might have been obtained, by due diligence and inquiry.[5] A party who becomes remediless at law by

[1] Claverly v. Williams, 1 Ves. jun. 210, 211.

[2] Bingham v. Bingham, 1 Ves. 126. 1 Mad. Ch. 62; and see Taylor v. Fleet, 1 Barb. S. C. R. 471, as to mutual mistake of facts being sufficient to avoid a contract.

[3] Earl v. Thornbery, 3 P. Wms. 126.

[4] Pooley v. Ray, 1 id. 354.

[5] Taylor v. Fleet, 4 Barb. 95. Dufree v. Thompson, id. 298. Perry v. Martin, 4 J. Ch. R. 566.

negligence, shall not be relieved in equity.[1] *Vigilantibus non dormientibus jura subveniunt.*[2]

The circumstance, that a material fact is mistaken or unknown, does not, *in all cases*, call for the interposition of a court of equity. If the fact be known to one party, and unknown to the other, it may be one item in the proof to establish a fraudulent concealment, misplaced confidence or surprise. But then, the relief, if granted, is so granted on the ground of fraud or misplaced confidence, rather than on the ignorance of the one party, and knowledge of the other. If A., knowing that there is a mine or a valuable quarry of marble on the land of B., of which he knows B. is ignorant, should buy the land of B. without disclosing the fact, for a price, in which the mine or quarry is not taken into consideration, B. would not be entitled to relief against the contract. The reason is, A., the purchaser, was under no obligation, from the nature of the contract, to make the disclosure.

If the fact be unknown to both parties, there is no principle on which equity can interpose, though it happen that the estate be more valuable than either party supposed. If both are equally innocent, each is entitled to whatever benefit may result to him from the purchase. But the law does not go to the romantic length, of requiring that both parties should be upon the same level, as to information or knowledge. It requires each party to be vigilant, and to abstain from any fact tending to mislead or deceive. If the parties stand on a footing of equality, and no fraud is committed by either, both must abide by the contract, and each is entitled to the benefit of his own sagacity. But the law exacts the utmost good faith, especially where the rights of sureties are concerned.[3]

If the means of information are open to both parties, and the vendee, before the purchase, acquires information not known to the vendor, materially enhancing the price of the article, and of which he knows the vendee is ignorant, equity cannot relieve. The reason is, the vendee was not bound to communicate the information he possessed. He must take care not to say any thing, tending to impose upon the vendor. It would be difficult to circumscribe the contrary doctrine, within proper limits, when the means of intelligence are equally accessible to both parties.[4] Thus, where the vendee, at New Orleans, during the war with Great Britain, in 1815, had received intelligence of the peace at the time he entered into the contract, of which fact the vendor was ignorant, pur-

[1] Perry v. Martin, 4 J. Ch. R. 566, per Kent, Ch. 1 Fonb. Tr. book 1, ch. 3, § 3.

[2] Br. Maxims, 692.

[3] Pidcock v. Bishop, 3 B & Cress. 605. Etting v. Bank U. S. 11 Wheat. 59 and cases there cited.

[4] Laidlow v. Organ, 2 Wheaton, 178-195.

chased of the latter 111 hogsheads of tobacco, for a certain price, far below its value in a state of peace, it was held that the purchase could not be avoided, notwithstanding the ignorance of the vendor of that material fact.[1]

A man of a nice sense of justice may feel that, *in foro conscientiæ*, the vendee should impart to the vendor intelligence which so essentially affects the market value of the article. The establishment of such a rule would require the vendor to disclose every thing in his power which might *lessen* its price. Thus, the two parties, instead of dealing with each other, as men usually do, at arm's length, each turning his own knowledge and sagacity to the best account, would be urging arguments to dissuade the other from entering into the contract which he was proposing to make. The common law has never gone to that visionary extent. Where the facts are equally unknown to both parties; or where each has equal and sufficient means of information; or where the fact is doubtful, or uncertain in its nature, if the parties act in other respects, with good faith, equity will not interfere.

Nor will equity interfere to set aside a contract made in good faith, on the ground of a mistake in judgment as to the value of the article.[2] Nor will it interfere where there was no fraud or misrepresentation, or surprise, nor mistake, except mistaken calculations and an unprofitable bargain.[3]

In Massachusetts it has been held that the supreme judicial court has no jurisdiction in equity, in cases of mere mistake.[4]

Where the number of acres conveyed is different from the original agreement for conveyances, equity will relieve on the ground of mistake; and if the variance be very great, the words, "more or less," in the deed, will not prevent the court from relieving.[5]

The cases of most frequent occurrence, where equity is invoked to correct mistakes of fact, arise under written contracts, either executed or executory. Sometimes relief is prayed because a substantial fact of the contract made has been omitted by accident or mistake, when it came to be reduced to writing. The case of Wood v. Hubbell, recently decided in the court of appeals of New-York, and discussed under the head of accident, was of this character.[6] The ommission, by the scrivener, of that

[1] Laidlow v. Organ, 2 Wheat. 178–195, and note. Pothier DeVente, No. 233.

[2] Hunter v. Goudy, 1 Hammond, 450.

[3] Begus v. Tingley, 11 Conn. 134.

[4] Gould v. Gould, 5 Met. 274.

[5] Young v. Craig, 2 Bibb, 270. Smith v. Smith, 4 id. 81. Marvin v. Bennett, 8 Paige, 312; S. C., 26 Wend. 169.

[6] Ante, "Accident." June T., court of appeals, 1853.

part of the contract which terminated the lease and the covenants on the destruction of the demised premises by fire, might appropriately be referred either to the head of Accident or Mistake. Sometimes relief is sought because there is a mistake as to the subject matter of the purchase.[1] Thus, where a trustee for an infant agreed to sell 200 acres of land, part of a lot of 250 acres, and executed a deed to the purchaser, describing the premises by metes and bounds, "containing two hundred acres more or less;" and the bounds included the whole lot of 250 acres; on a bill filed, after the death of the trustee, by the cestui que trust, for relief against the mistake, the vendee was decreed to reconvey the fifty acres.[2] On the same principle it is obvious that relief may be granted in any case where the agreement is, by accident or mistake, materially variant from what the parties intended.

It is a general principle of the common law that parol evidence is not admissible, to contradict or vary or add to the terms of a deed, or other written contract.[3] "It would be inconvenient," says Lord Coke, "that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement between the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others, in such cases, if such nude averments against matter in writing should be admitted."[4] This principle is the general rule, and is founded in wisdom and policy. But if the rule were inflexible, and in no case to be departed from, it would abrogate an essential part of equity jurisdiction. Fraud, accident and mistake are undisputed subjects of relief in equity. How can fraud, accident or mistake in written contracts, be made to appear but by parol proof? If the fact be denied by a party gaining a benefit thereby, the victim of fraud, or accident, or mistake, would be without redress. The granting of relief in cases of this kind, rests upon the principle that parol evidence, to explain, contradict or supply a written instrument, in a proceeding in equity to reform the instrument, is an exception to the general rule. And although it has often been strenuously resisted by counsel, yet the exception is as firmly established as the rule itself.[5] Lord Hardwicke said the court had jurisdiction to relieve, in respect of a plain *mistake* in contracts in writing, as

[1] Calverley v. Williams, 1 Ves. jr. 210.
[2] Gillispie v. Moon, 2 John. Ch. R. 585.
[3] 1 Phil. Ev. 548.
[4] See the cases at law on this subject collected in C. & H. Notes to Phil. Ev. p. 1428.
[5] Bull v. Storie, 1 Sim. & Stu. 210, 219, 220.

well as against frauds in contracts.[1] In another case the same eminent chancellor corrected a bond which was by mistake made joint, instead of joint and several.[2] And in another case, though he dismissed the bill for want of proof, he said that *mistakes* and misapprehensions in the drawer of a deed, contrary to the design of the parties, is as much a head of relief as fraud and imposition.[3] And in another case his lordship said, "how can a mistake in an agreement be proved but by parol evidence? It (the deposition) is not read to contradict the face of the instrument, but to prove a mistake therein."[4] Lord Ch. King allowed a mistake in a marriage settlement to be corrected.[5] Lord Loughborough corrected a bond, making it several instead of joint.[6] And Lord Thurlow, in a much agitated case, laid down the rule with great latitude, that if a *mistake* appears, it is as much to be rectified as a fraud.[7] And in another case, he held that parol proof was not incompetent to prove that words taken down in writing were, by mistake, contrary to the current testimony of all parties. And Lord Eldon in a later case said, that it would be very singular, if the jurisdiction of the court should not be capable of being applied to cases of *mistake* and surprise, as well as of fraud.[8] He owned that those who undertook to rectify an agreement, by showing a mistake, undertook a task of great difficulty, but he could not say the evidence was incompetent, though it was not possible to reconcile all the cases on the question.

On the same principle, defects in mortgages, contrary to the intention of the parties, have also been made good against subsequent judgment creditors, who came in under the party who was bound in conscience to correct the mistake.[9] On the like principle, a resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust.[10] A deed, absolute on its face, may be shown by parol to be intended as a mortgage.[11] Such evidence was at one time held admissible, in this state, in a court of law, to show that a deed absolute on its face was intended as a mortgage.[12] But that doctrine

[1] Henkle v. Royal Exchange Assurance Co., 1 Ves. 317.

[2] Simpson v. Vaughan, 2 Atk. 31.

[3] Langley v. Brown, 2 Atk. 203.

[4] Baker v. Paine, 1 Ves. 456.

[5] Randall v. Randall, 2 P. Wms. 465.

[6] Burn v. Burn, 3 Ves. jr. 473.

[7] Taylor v. Rudd, cited 5 Ves. 595.

[8] Marquis of Townshend v. Stangroon, 6 Ves. 328.

[9] Taylor v. Wheeler, 2 Vern. 564. Finch v. Earl of Winchelsea, 1 P. Wms. 277.

[10] Boyd v. M'Lean, 1 John. Ch. R. 582. Jameson v. Graves, 2 Blackf. 440.

Washburn v. Merrills, 1 Day's Cases in Error, 139.

[12] Roach v. Casine, 9 Wend. 227. Walton v. Cronly, 14 id. 63. Swart v. Servin, 21 id. 36. Webb v. Rice, 1 Hill, 606.

has been since exploded, and such evidence is admissible only in a direct proceeding to reform the instrument.[1]

The rule that parol evidence may be received in opposition to a written contract, in an action brought to reform it, on the ground of mistake, or in a case where it is set up as matter of defense, has often been applied in this state. Chancellor Kent uniformerly held, that equity relieves in cases of mistake as well as against fraud, in a deed or contract in writing; and that parol evidence was admissible to prove the mistake, though it was denied in the answer; and this, either when the plaintiff seeks relief, affirmatively, on the ground of the mistake, or when the defendant sets it up as a defense to rebut an equity.[2] But it is properly added that, to shew a mistake in a written instrument, the evidence must be clear and strong, so as to establish the mistake to the entire satisfaction of the court.[3]

The principle, that parol evidence is admissible to contradict a deed or other instrument in cases of fraud, accident or mistake, was recognized by Ch. Sandford,[4] but the evidence was excluded, in the case before him, because neither fraud, accident or mistake was alleged. The case was therefore not brought within the exception to the general rule. Chancellor Walworth recognized the same doctrine, saying that the rule is, that the written agreement itself is the best evidence of what the parties intended should be the final and binding contract between them, when nothing has been left out of the written contract *by fraud or mistake*, which the parties supposed was inserted therein when the agreement was executed by them.[5] The doctrine is thus recognized, that the allegation of *fraud or mistake* will let in evidence to shew the truth against the language of the instrument.

It does not make any difference, with respect to the jurisdiction of the court to relieve in cases of accident or mistake, whether the agreement arose under the statute of frauds, or the common law. In both cases the general rule is, that the written instrument furnishes better evidence of the deliberate and final intention of the parties, than any parol proof can supply. And the exceptions apply as well to one class of agreements as the other. And equity has afforded relief or withheld it, according to

[1] Webb v. Rice, 6 Hill, 219.

[2] Gillespie v. Moon, 2 J. Ch. R. 51, 585. Id. Lyman v. United States Ins. Co. 2 J. Ch. R. 630. 1 Fonb. Eq. book 1, ch. 2, § 8. Moses v. Murgatroyd, 1 J. Ch. 119, 128. Wiser v. Bachley, 1 J. Ch. R. 607. Bottsford v. Burr, 2 J. Ch. R. 413. Keissenbrack v. Livingston, 4 J. Ch. R. 148. Roosevelt v. Dale, 2 Cowen, 129. Leavitt v. Palmer, 3 Comst. 19.

[4] Meads v. Lansing, 1 Hopk. 124.

[5] Jarvis v. Palmer, 11 Paige, 658.

circumstances, in cases of policies of insurance, charter parties, bonds and other commercial paper.[1]

A distinction has sometimes been taken between cases where the plaintiff seeks to reform a contract, and then compel its execution specifically as reformed, and cases in which the defendant sets up the mistake as matter of defense, against a claim for the specific execution of the agreement. In the former case, relief has been denied in England, though granted in the latter; and the distinction has been sustained by respectable authority in this country.[2] But this distinction has not been approved or followed in this state, but has been expressly overruled by Chancellor Kent.[3] In one of the cases, the learned chancellor observes, that he is not sufficiently instructed, at present, to admit the soundness of the distinction which holds parol evidence admissible to correct a writing as *against* but not *in favor* of a plaintiff seeking specific performance of an agreement. Lord Hardwicke does not seem to have been aware of such a distinction in the two cases to which Sir William Grant refers, in Wollam v. Hearne. Lord Thurlow rejected parol proof in the case of Irnham v. Child, (1 Bro. 92,) when offered by a plaintiff seeking performance of an agreement, and at the same time seeking to vary it by parol proof; but he went upon general grounds, applicable to such proof, as coming from either party. "And why," says the chancellor, "should not the party aggrieved, by a mistake in the agreement, have relief as well when he is plaintiff as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of the one party or the other. If the court has a competent jurisdiction to correct such mistakes, (and that is a point understood and settled,) the agreement, when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties. The one case illustrates the other. *Res accendent lumina*

[1] Getman's Ex'rs v. Beardsley, 2 J. Ch. R. 274. Edwin v. East India Co. 2 Vern. 210. Meach v. Lansing, Hopkins, 124. Simpson v. Vaughan, 2 Atk. 31. Dwight v. Pomroy, 17 Mass. 303. Underhill v. Harwood, 10 Ves. 225, 226. Edwards v. Child, 2 Vern. 727. Lyman v. The United Ins. Co. 2 J. Ch. R. 630. Graves v. The Boston Ins. Co. 2 Cranch, 419.

[2] Clinman v. Cook, 1 Scho. & Lef. 22. Wollam v. Hearne, 7 Ves. 211, by Sir William Grant, M. R. Osborn v. Phelps, 19 Conn. 63.

[3] Gillespie v. Moon, 2 J. Ch. R. 585. Keissenbrack v. Livingston, 4 id. 144.

rebus." This reasoning seems to have met the approbation of Mr. Justice Story.[1] In a note the learned justice adds, that if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is no more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the statute of frauds, if not more intelligible, it would, at least, have been less inconvenient in practice. But it does not appear to have been thus restricted although the cases in which it has been principally relied on have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defense of this sort, against a plaintiff seeking the specific performance of a contract, and the correction of a mistake, as it will to enforce a contract against a defendant, which embodies a mistake to his prejudice.[2]

On a bill to redeem a mortgage, parol evidence is admissible to show that a conveyance, absolute in terms, was intended as a mortgage. Oral evidence is admitted or rejected in such cases, not by the mere force of any statute, but upon the principle of equity jurisprudence.[3] These principles are, that equity will relieve in cases of fraud, accident or mistake—whether a deed intended as a security is made absolute in terms, is generally the result of accident or mistake; or of a fraudulent design on the part of the party taking the security. Where the difference between the deed as expressed, and the deed as intended, may have arisen from mistake, or ignorance, or accident, it becomes necessary to let in parol proof to discover and carry into effect the real intention of the parties in creating the security.[4]

In regard to mistakes made by arbitrators, it was said by Lord Cowper in one case, that if it appears that the arbitrators went upon a plain mistake, either as to *the law* or *the fact*, and the error appears in the body of the award, it is sufficient to set it aside.[5] Lord Hardwicke approved of this decision, but observed that if it had been a doubtful point of law the arbitrators' award might have stood.[6] But on a general reference of all matters in dispute, though the arbitrator decides wrong, on a question of law, equity will not interpose.[7] And this doctrine was repeated

[1] 1 Eq. Juris. § 161, and notes.

[2] Note to Story's Eq. Juris. § 161.

[3] Russell v. Southard, 12 How. 139, 147. Slee v. Manhattan Co., 1 Paige, 48. Randall v. Philips, 3 Mason, 378. Dickenson v. Dickenson, 2 Murphy, 279. Lancaster v. Burkhart, 2 Bibb, 28. Blanchard v. Keaton, 4 id. 451.

[4] Moses v. Murgatroyd, 1 J. Ch. R. 127 Mark v. Pell, id. 595.

[5] Corneforth v. Geer, 2 Vern. 705.

[6] Ridout v. Paine, 3 Atk. 494. Ching v. Ching, 6 Ves. 282.

by Lord Eldon in a subsequent case.[1] This subject was brought in discussion before Chancellor Kent, in an early case,[2] when a reference was made by consent, to one merchant and two gentlemen of the bar, with directions to state an account, and to decide on all questions in dispute between the parties, "as well matters of law as of fact." In remarking upon this the chancellor says, "After the parties have chosen to submit a point of law to gentlemen of the profession, it may be doubted whether the court ought to permit the discussion to be renewed here, without showing a case of *gross and palpable mistake*." Courts of law are inclined to hold the decision of arbitrators conclusive upon the parties, and not permit their award to be questioned by evidence tending to show that it was erroneous.[3]

This subject is of less importance in this state since the code has provided for referring all the issues in a cause, whether of fact or law, to referees, and has prescribed a convenient and efficient mode of reviewing the decision of the referees, both upon the facts and the law.[4]

Where the legal rights of parties have been changed by mistake, equity restores them to their former condition, where it can be done without interfering with any new rights, acquired on the faith and strength of the altered condition of the legal rights and without doing injustice to other parties. Thus, where a mortgage to the plaintiff had been given by an intestate, and after his death it was cancelled and a new mortgage taken to the heir, on the same premises in its stead, the court set up the old mortgage, and gave it priority as against the creditors at large of the deceased, upon the ground that the first mortgage had been canceled under a mistake of fact in regard to the existence of debts beyond the amount of assets; and that the creditors had not, in any way, been prejudiced by the cancellation.[5] The same doctrine was recoganized in a later case, the difference between them being, that in one the mistake was *inferred*, and the other *proved*.[6] Relief, in cases where instruments in writing had been given up and cancelled by mistake, has repeatedly been granted by the English court of chancery.[7]

In like manner, where a regular decree was obtained by default, equity opens the same, even after enrollment, for the purpose of enabling the the defendant to defend on the merits, when he was deprived of such

[1] Young v. Walter, 9 Ves. 364.

[2] Roosevelt v. Thurman, 1 J. Ch. R. 226.

[3] Robertson v. McNiel, 12 Wend. 578.

[4] Code, § 270 et seq.

[5] Hyde v. Tanner, 1 Barb. S. C. R. 75.

[6] Banner v. Cormack, id. 392.

[7] East India Co. v. Neave, 5 Ves. 173. Same v. Donald, 9 id. 275.

defense by *accident* or *mistake*. And it was held that such decree might be opened, after a sale had been made by a master, under the decree, the complainant himself having been the purchaser of the premises, and not having parted with his interest therein to a bona fide purchaser or mortgagee.[1]

Nor does it make any difference, in reforming the errors of written instruments, occasioned by accident or mistake, that the instrument was drawn by the party who seeks such relief. If the true agreement and the consequent mistake in the written instrument be established by the evidence, can a court of equity, asks Sir John Leach, V. C., refuse relief, because it appears that the party seeking relief, himself, drew the instrument, unless it be a principle in a court of equity not to relieve a party against his own mistakes? There is no such principle, the V. C. answers, in a court of equity. Common mistake is the ordinary head of jurisdiction; and every party who comes to be relieved against an agreement he has signed, by whomsoever drawn, comes to be relieved against his own mistake.[2]

Where an estate has been purchased at auction, under a mistake as to the lot put up for sale, the court will not decree a specific execution of the agreement, but leave the vendor to his remedy at law for damages, if he has sustained any.[3]

In cases where there are written memorandums made by the parties preparatory to the final agreement, there is less danger in correcting mistakes in the latter, than if the whole rested in parol. This does not conflict with the general rule, that all antecedent memorandums and conversations are deemed to be merged in the final agreement. For if it is shewn that the latter was made in pursuance of the former, and was intended to carry out the same in a more formal way, and if it is clearly shewn that, by accident, mistake or fraud, it fails to do so, the case falls within the same exception already mentioned, which allows written contracts and instruments to be reformed for accidents and mistakes, and those accidents and mistakes to be proved by parol evidence. The general rule, in such cases, is subordinate to the undisputed jurisdiction of equity over accidents, mistakes and fraud.[4] In conformity to these views, marriage settlements have frequently been reformed and made according to the original articles or proposals, and deeds have been made to correspond with executory contracts, where the discrepency was clearly the result of mistake or fraud. The cases on this subject are extremely

[1] Millspaugh v. McBride, 7 Paige, 509.
[2] Ball v. Storie, 1 Sim. & Stu. 210, 220.
[3] Malins v. Freeman, 2 Keen, 25.
[4] Ball v. Storie 1 Sim. & Stu. 210, 220.

numerous, and most of the early ones are collected in the notes to Fonblanque's Equity, and there are many recent decisions on the same subject.[1]

It is sometimes made a question, how far equity will relieve in case of mistake in wills. Lord Cowper decided more than a century ago, that the canceling a former will by mistake, or on the presumption that a later will is good, which proves void, will not let in the heir, but may be relieved against in equity.[2] In such case equity does not alter the will It merely relieves the party from the effect of the *mistake*, thus placing him in the same condition as if the mistake had not happened. The revised statutes have provided that no will in writing shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed. Subsequent sections provide in what cases marriage and issue shall operate as a revocation.[3] No doubt the statute intended to cut off all modes of revocation except those mentioned in the act. Under our statute it has been held, that a will cannot be corrected because the testator misapprehended its effect; and that, as a general rule, parol evidence is inadmissible to supply omissions, or to control or explain the intention, or vary the legal construction.[4] Such errors are mistakes of law only.

This principle does not prevent equity from correcting mistakes as to the person named as legatee in a will. If the context affords sufficient evidence of the identity of the person intended as legatee, the will alone must be looked to in order to clear up the difficulty and determine the question. If, after examining the whole will, it is still impossible to ascertain from such a source alone who is the proper person to take, then recourse must be had to parol evidence. In no case, however, is the bequest to be decreed void for uncertainty as to the person, provided the person intended to take can be identified by any competent evidence. If a legacy is given to a person by a correct name, but with a wrong description or addition, the latter will not vitiate the bequest, but will be rejected. Thus, where a legacy was left to Mary S., wife of Nathaniel

[1] Fonbl. Equity, B. 1, ch. 3, § 1, and notes. The Marquis of Exeter v. The Marchioness of Exeter, 3 Mylne & Craig, 321. The Marquis of Breadalbane v. The Marquis of Chardos, 2 id. 711. Pearce v. Verbeke, 2 Beavan, 333. Brown and wife v. Bonnes et al. 8 Leigh, 1. Long v. Israel, 9 id. 556. Rogers v. Atkinson, 1 Kelly's R. 12. Newson v. Bufferlow 1 Dev. Eq. 379.

[2] Onions v. Tyler, 1 P. Wms. 345.

[3] 2 R. S. 64, § 42 et seq.

[4] Arthur v. Arthur, 10 Barb. 9. Gilbert v. Gilbert, 9 id. 532.

S., $300—Mary S.'s husband was named *Abraham*, and Sarah S.'s husband was named *Nathaniel* S. Upon extrinsic evidence and circumstances, it was held that Mary Smith was intended.[1] Here, it is obvious, no mistake in the will is corrected. An ambiguity, created by external evidence, is removed in the same way.

So where the name of the legatee was entirely mistaken by the testator, as *Cornelia Thompson* for *Caroline Thomas*, the bequest was held good; and the intention of the testator and the misnomer being satisfactorily shewn, the legacy was ordered to be paid to the person intended.[2]

In an early case, more than a century ago, a mistake in both the christian and surname of the legatee was disregarded, and the money ordered to be paid to the person intended;[3] and the same doctrine was repeated at a later period.[4]

Chancellor Walworth, where a testator made a bequest to a person by a wrong christian name, admitted parol evidence to shew what person was intended. He said the cases are very contradictory on the subject of admitting parol evidence to correct mistakes in testamentary dispositions. If a legacy was given by a testator to his brother John, and it turned out in evidence that he had but one brother, whose name was James, there could be no doubt that the latter would be entitled, because the description of brother in that case would alone be sufficient, and the name might be rejected as surplusage.[5]

In the foregoing cases the bequest was of a personal thing. Lord Macclesfield, in Branmont v. Fell, (supra,) in speaking of the case before him, which was where there was a mistake of both the christian and surname of the legatee, says, if this had been a grant, nay, had it been a devise of land, it had been void, by reason of the mistake both of the christian and surname. But this being a bequest of a personal thing, a chattel interest, makes it a different case, and, as originally, a bequest of a legacy was governed by, and construed according to, the rules of the civil canon law, so shall it be after making the statute of frauds, provided there be a will in writing.[6]

Where a testator having two sons named John, evidence *dehors* the will may be given to shew which son was meant. But if no direct evidence can be given to shew the intent, the will is void for the uncertainty.[7]

[1] Smith v. Smith, 1 Edw. Ch. R. 189. S. C. on appeal, 4 Paige, 271.
[2] Thomas v. Stevens, 4 J. Ch. R. 607.
[3] Beaumont v. Pell, 2 Atk. 140.
[4] Bradwin v. Harpur, Amb. 374.
[5] Connolly v. Pardon, 1 Paige, 291
[6] Branmont v. Fell, 2 P. Wms. 142.
[7] Lord Cheney's case, 5 Co. 68.

Lord Hardwicke in one case said, parol evidence was admissible to shew who was intended where a legacy is given to one by a nickname, but he would not allow such evidence of the intention of the testator, where there is only a blank.[1]

No reason is perceived why a plain and palpable mistake in a will may not be corrected in equity, as well as a similar mistake in a deed. The object of the correction in both cases is the same, to make the instrument what the party intended, when that intention was defeated by a mistake of fact.

A testator by his will gave legacies of five hundred pounds to two grandchildern of his sister, describing them by name, and their residence in America; and afterwards by a codicil he revoked these legacies, giving as a reason that the legatees were dead. The testator was *mistaken* in the fact of the death of the legatees, as both were living at the time of his death. Lord Loughborough, held that there was no revocation. the reason for it being false, whether by misinformation or mistake, is perfectly indifferent, and he directed the legacies to be paid on proof of identity of the legatees.[2]

So where the residue of three per cent annuities were given to the two daughters of A., and A. had three daughters; they all, on the ground of mistake, were decreed to take equal shares.[3]

Parol evidence is not admissible to *contradict* a will.[4] The mistakes in wills which equity will correct, must be such *as appear on the face of the will*, otherwise no relief can be granted. Evidence of matter *dehors* the will to shew the mistake, is not sufficient.[5] Whenever there is a clear *mistake*, or a clear *omission*, recourse must be had to the general scope of the will, and the general intention to be collected from it.[6] In one of these cases the court substituted *twenty* thousand pounds for *thirty* thousand pounds, the court being clearly of the opinion that the former, and not the latter, was the sum intended by the testator to be given. And the principle of these cases was recognized by the supreme court in a recent case.[7]

Where a testator in the former part of his will gives a certain horse to A., and in a subsquent part of the will gives the same horse to B., the better opinion is, that the latter legacy is a revocation of the former, con-

[1] Baylis v. Church, 2 Atk. 239. See Martin v. Ballou, 13 Barb. 119.

[2] Campbell v. Frink, 3 Ves. jr. 320.

[3] Stebbins v. Walkly, 2 Bro. C. C. 85.

[4] Ulrich v. Litchfield, 2 Atk. 372. and notes.

[5] Id.

[6] Melish v. Melish, 4 Ves. 47. Philips v. Chamberlain, id. 51.

[7] Martin v. Ballou. 13 Barb. 119, 122

trary to the opinion of Swinburne, who thought the horse must be divided between the two legatees.[1]

Equity sometimes relieves in case of a defective execution of a power, on the ground of accident or mistake, but not in case of a non-execution of a power, as distinguishable from a trust. Relief is granted in such case, in favor of creditors, purchasers for valuable consideration, a wife, or children. The master of the rolls said, in an early case, that there was a difference betwixt a *non-execution* and a *defective* execution of a power. The latter will always be aided in equity, under the circumstances mentioned, which were the provisions for a wife who had none before, it being the duty of every man to pay his debts, and a husband or father to provide for his wife, or child. But this court will not help the *non-execution* of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.[2]

Sir William Grant and Lord Erskine both expressed dissatisfaction with this distinction, as not quite consistent with the principles of equity, though they admitted that it was fully established by authority.[3] And Lord Erskine observed, that the authorities are most important, and follow in a series from the year 1668 to the end of Lord Hardwicke's time; from which it appears, that the distinction between the *non-execution* and the *defective* execution of a power has been constantly taken. In a still later case the master of the rolls said, that equity would, in favor of persons standing in a situation entitling them to its protection, supply a defect in the execution of a power which consists in the want of some circumstance required in the manner of the execution, as the want of a seal or of a sufficient number of witnesses, or where it has been exercised by a deed instead of a will.[4] It will not, however, correct an error in an instrument, as has been before shewn, occasioned by the *ignorance* of the parties in matter of law.[5] The distinction seems to be founded in reason and good sense. Equity could not compel the execution of a power, where there is no trust, without depriving the party of all discretion. On the other hand, when the party undertakes to execute, and, by accident or mistake, fails to accomplish his purpose, equity interposes to carry the

[1] Ulrich v. Litchfield, 2 Atk. 375. Sims v. Doughty, 5 Ves. 243. Purse v. Snaplin, 1 Atk. 416.

[2] Tollet v. Tollet, 2 P. Wms. 490. 1 Fonb. Eq. book 1, ch. 1, § 7, and notes.

[3] Holmes v. Coghill, 7 Ves. 506; S. C. on appeal, 12 Ves. 212.

[4] Cockerell v. Cholmeley, 1 Russ. & My. 418.

[5] Id.

intention into effect in favor of those who are peculiarly entitled to its protection, creditors, purchasers, wives and children. And the master of the rolls in one case said, that the court has never gone beyond supplying a defective execution of a power in favor of that class of persons.[1] And in that case he refused it in favor of the husband.

The revised statutes of New-York have abolished powers as they existed in 1830, and have enacted that the creation, construction and execution of powers shall be governed by the provisions of the act.[2] The general subject of powers does not belong to this treatise. At present we are considering only the cases where courts will relieve against mistakes in the execution of powers. On this subject it is provided, that when the grantor shall have directed any formalities to be observed in the execution of the powers in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded, in the execution of the power. With these exceptions, the intention of the grantor of the power, as to the mode, time, and conditions of its execution shall be observed, subject to the power of the court to *supply a defective* execution in the cases thereafter provided.[3]

The statute provides, that every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested.[4] And it further provides, that where the execution of a power in trust shall be defective, in whole or in part, its proper execution may be decreed, in equity, in favor of the persons designated as the objects of the trust. Purchasers for valuable consideration, claiming under a defective execution of *any* power, shall be entitled to the same relief in equity, as similar purchasers, claiming under a defective conveyance from an actual owner.[5]

[1] Mooder v. Reid, 1 Mad. R. 516, 521.
[2] 1 R. S. 732.
[3] 1 R. S. 736, §§ 119, 120, 191.
[4] 1 R. S. 734, § 96.
[5] 1 R. S. 737, §§ 131, 132.

CHAPTER II.

OF ACCOUNT.

THE action of account is one of the most ancient of the common law actions. Originally it could be maintained only against a bailiff, receiver or guardian, or in favor of trade, between merchants, yet it could not be maintained by, or against, their representatives.[1] By various statutes it was given first to the executors of merchants, then extended to the executors of executors, and afterwards to administrators; and finally, by the 3 and 4 Ann. ch. 16, it was allowed to be brought against executors and administrators of every guardian, bailiff and receiver, and by one joint tenant, tenant in common, his executors and administrators, against the other as bailiff for receiving more than his share, and against their executors and administrators.[2]

The New-York statute of 6th February, 1788, incorporated the provisions of the English statutes, and pointed out, very blindly, the mode of proceeding in the action.[3] The process to compel an appearance was by summons, attachment and outlawry; and on the defendant's appearing and submitting, he was adjudged to account, whereupon auditors were appointed to take the accounts. He was liable to be committed to jail for refusal to account, and for neglecting to pay what was found due. The auditors were empowered to examine the parties upon oath.

Though an action of account could not, at common law, have been maintained against the representatives of bailiffs, receivers, or guardians, yet a bill in equity for an account might be sustained; and such appears to have been the usual remedy prior to the remedial statutes.[4]

Chancellor Kent in one case before him observed, that courts of law and equity have concurrent jurisdiction in matters of account. "In that action," he observes, "the auditors have all the requisite powers, for they can compel the parties to account, and to be examined under oath. And

[1] Co. Litt. 90, b.
[2] Fonb. Eq. book 2, ch. 7, § 6, note N.
2 Greenl. 4. 1 R. L. of 1813, p. 90.
[4] Fonb. Eq. book 2, ch. 7, § 6, note.

I have not," said he, "been able to discern any good reason, why that action has so totally fallen into disuse."[1] At the time the learned chancellor made the remark, there was not a trace in the reported decisions of our courts, that an action of account had ever been brought in the state, though it is believed that it had been attempted in a few instances, with what success, we are left to conjecture.

At the revision of the laws in 1830, an attempt was made to bring this action into repute. It was enacted that when any action of account shall be brought by one or more partners, or by any joint tenant or tenant in common, or against any guardian, bailiff, receiver, or *otherwise*, and judgment be rendered that the parties account, or that the defendant account to the plaintiff, the cause shall be referred to referees, in the same manner, and subject to the same provisions, as are prescribed in cases of a long account. The referees are then required to proceed as in other cases of references, and they are empowered to examine the parties upon oath, and to require the production of books of account, papers and documents, in the custody or under the control of either party.[2] Subsequent sections prescribe the proceedings before the referees, and the judgment to be given. While at common law, the parties could plead after the judgment *quod computet*, that practice seems to have been superseded by the revised statutes, and it was intended that the action should proceed like other actions, which are referred to referees.[3]

The substitution by the revised statutes of referees for auditors, and the ordinary proceedings on a reference for the ancient pleadings subsequent to the judgment *quod computet*, at common law, does not seem to have introduced the action to much favor. The first appearance of the action, after the change, was in 1838, when the only point decided was, that the defendant was not entitled to notice of hearing, before the referees, when he had not appeared in the action either in person or by attorney.[4] About four years afterwards another action was brought, and decided in favor of the defendant on special demurrer to the declaration.[5] The defects in the declaration were that it was too general, one count charging the defendant as receiver, without stating by whose hands the money was received, and another charging him as bailiff, without specifying the kind or quality of goods, or alleging that the defendant had received more than his share. It does not appear by the report that the court gave the plaintiff leave to account. They treated the action with evident disfavor. They said

[1] Duncan v. Lyon, 3 John. Ch. R. 361.
[2] 2 R. S. 385, §§ 49, 50.
[3] Kelly v. Kelly, 3 Barb. S. C. R. 419.
[4] Jacobs v. Fountain, 19 Wend. 121.
[5] McMurray v. Rawson, 3 Hill, 59.

that the revised statutes did not dispense with any of the old forms of proceeding previous to the judgment *quod computet*. And Bronson, J., said, "All the books agree, that this is one of the most difficult, dilatory and expensive actions that ever existed, and it has long since given place to other remedies. In this state, it does not appear that more than one action of account was ever brought, before Jacobs v. Fountain, (19 Wend. 121,) and the present experiment will probably be the last. In England, the action seems not to have been brought more than a dozen times within the last two centuries, and, in most of the cases, the difficulty has been about the form of the remedy, rather than the rights of the parties. One of the last cases which I have noticed in the English books, was brought in 1768 and ended in 1770.[1] But it is worthy of remark, that the account was never taken. The case was decided on a demurrer to a plea before the auditors. Ch. J. Wilmot said he was glad to see the action of account revived; but at the same time told the counsel, 'the court was in some doubt how the judgment must be entered, and about the damages;' and he recommended expedition, as the plaintiff was very old, and the cause had been depending (*in chancery and at law*) fourteen years, and it was high time it should be ended. The counsel took until the next term to find out what judgment should be entered, and whether they were right at the last, does not appear." After alluding to three subsequent cases in England, where the action was brought,[2] he proceeds: "In some of the states the action is in use in a modified form, to supply the defect in their system from the want of a court of equity. In this state there is no such reason for attempting to revive and remould a remedy, which was always difficult, and has now become obsolete; and if parties choose to bring *account*, they must take the action as it was left by the ancients subject only to such alterations as have been made by the legislature."

An action of account was again brought in this state, as late as 1848, and was sustained.[3] The learned judge who gave the opinion of the supreme court said, that since the revised statutes, there has been no more difficulty in prosecuting an action of account *after* a judgment of *quod computet*, than in prosecuting an action of assumpsit involving the examination of a long account. The court held the action sustainable under the statute, between partners in any business, and that the action was not limited to mercantile copartnerships. In that case, too, the sum recovered was less than one hundred dollars, though the sum claimed was

[1] Godfrey v. Saunders, 3 Wils. 73.

[2] The cases referred to are, Smith v. Smith, 1 Chitty's R. 10; Archer v. Prichard, 3 Dowl. & Ryl. 596; and Baxter v. Hozier, 5 Bing. N. S. 288.

[3] Kelly v. Kelly, 3 Barb. S. C. R. 419.

much more than that sum. Hence it was not a case, as the law then stood, in which the plaintiff, had he filed a bill in chancery, could have recovered costs; but he would, on the contrary, have been subjected to costs of the other party in the discretion of the court.[1]

The abolition of the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, and the substitution therefor of one form of action for the enforcement or protection of private rights and the redress of private wrongs, to be denominated a civil action, have superseded the scholastic refinements and cumbrous proceedings in the action of account at common law.[2] But as equity still exists as a distinct branch of our remedial system of justice, and as the relief usually prayed in a bill for an account is of an equitable, rather than of a legal nature, the treating of the subjects, formerly relievable by action of account, or by a bill in chancery for an account, falls appropriately, now, as well as formerly, under the head of equity jurisprudence.

Two of the grounds on which equity formerly obtained jurisdiction in the common law action of account, were the existence of the right of the defendant, in some cases, to wage his law in common law courts, which he did not possess in equity, and the power which the latter court had of enforcing a discovery, which the former had not. Neither of these grounds now exist in this state. The wager of law has long since been abolished,[3] and other modes of examination of parties have taken the place of a discovery in equity,[4] though the latter has not been abolished, except in aid of the prosecution or defense of another action. Still the jurisdiction of equity having once been obtained, would not be lost by such changes of the law. Blackstone says, "that courts of equity, as incident to accounts, take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to account, they also take the concurrent jurisdiction of titles, and all questions relating thereto; and of all dealings in partnerships, and many other mercantile transactions; and so of bailiffs, receivers, factors and agents. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts."[5]

In many of the foregoing cases courts of law could conveniently exercise jurisdiction, under the action of assumpsit, covenant or debt, and

[1] 2 R. S. 173, § 37. Smits v. Williams, 4 Paige, 364.

[2] Code of Procedure, §§ 69, 140.

[3] 1 Greenl. L. N. Y. 295.

[4] Code of Procedure, § 389 et seq.

[5] 3 Black. Com. 437.

under the code, by an ordinary civil action, without invoking equitable relief. The salutary provision of the code, for referring all or any of the issues in a cause by consent to one or more referees; and without such consent, to direct a reference, when the trial of an issue of fact shall require the examination of a long account on either side; or when *the taking of an account shall be necessary for the information of the court*, before judgment, or for carrying a judgment or order into effect, has superseded most of the difficulties which formerly existed in the action at law.[1] The power given to the referees; the mode of procedure before them; their report upon the whole issue; and the method prescribed for reviewing their decision, are eminently calculated to subserve the purposes of justice.[2] The practice in this respect is the same, whether the matter referred be of legal or equitable cognizance.

It will be found more convenient, in the discussion of the doctrine of account, to restrict our inquiries to a few only of the subjects which often terminate in account, or which are incidental to the action. We shall treat the subject of legacies, marshaling of assets, and various other matters which often lead to account, under other heads.[3]

At common law, an action of account lay only in cases where there was either a privity of deed by the consent of the party, as against a bailiff or receiver, or a privity in law, *ex provisione legis*, as against a guardian in socage.[4] In an account against a *receiver*, who receiveth money to the use of another, to render an account, he shall not, says Coke, upon his account, be allowed his expenses and charges; and, therefore, a man could not charge a bailiff as a receiver, because then the bailiff should loose his expenses and charges. In an account against a receiver, the plaintiff must declare by whose hands the defendant received the money, which he shall not do in the case of a bailiff. But in some cases in an action of account against one, as *receptor denariorum*, he shall have allowance of his expenses and charges, and shall also account for the profit he received, or might reasonably receive; and this was provided by law in favor of merchants, and for the advancement of trade and traffic. As if two joint merchants occupy their stock, goods and merchandises in common, to their common profit, one of them, naming himself merchant, shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum*, &c.[5]

[1] Code of Procedure § 270 et seq.
[2] Code, § 272
[3] See post, Chapter on Trusts.
[4] Fonb. Eq. book 2, ch. 7, § 6. Co. Litt 172, a.
[5] Co. Litt. 172, a.

Some of the grounds on which equity originally acquired jurisdiction in the action of account have been hinted at, but the more general ground is believed to be, not that the party was without remedy at law, but that the remedy in equity was more adequate and complete, and that it prevented a multiplicity of suits. Lord Hardwicke expressed himself in favor of the jurisdiction, in a case before him, because it was a matter of *contract and account*, and consequently a proper subject for the jurisdiction of a court of equity.[1]

The preventing of a multiplicity of suits has been often held a good ground for equity to interfere; and having thus rightfully acquired jurisdiction for one purpose, the practice was to retain it for the purpose of full and general relief.[2] Cases of mutual accounts, founded on privity of interest, are undisputed grounds of equity jurisdiction.[3]

In Bacon's Abridgment, after speaking of the difficult, dilatory and expensive proceedings in the action of account at common law, the author says: "It is now seldom used, especially if the party have other remedy, as debt, covenant, case; or if the demand be of consequence, and the matter of an intricate nature; for in such case it is more advisable to resort to a court of equity, where matters of account are more commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled to a discovery of books, papers and the defendant's oath; and, on the other hand, the defendant being allowed to discount the sums paid and expended by him; to discharge himself of sums under forty shillings by his own oath, (provided he swears positively, and not as to belief only;) and if by answer or other writing he charges himself by the same to discharge himself, which will be good, if there be no other evidence: farther, all reasonable allowances are made to him; and, if after the account is stated, any thing be due to him upon the balance, he is entitled to a decree in his favor."

Courts of equity have entertained jurisdiction in account, not only when the accounts were *mutual accounts*, founded on *privity of contract*, but also when the *accounts were on one side only*, and a *discovery* was sought, in aid of the account, and obtained.[5] On the principle of discovery it has been entertained in case of agency, by the principal

[1] Billon v. Hyde, 1 Atk. 128.

[2] Conro v. Port Henry Iron Co., 12 Barb. 27. Armstrong v. Gilchrist, 2 John. Cas. 424. King v. Baldwin, 17 J. R. 388. Rathbun v. Warren, 10 id. 587. 1 Mad. Ch. Pr. 71.

[3] Post v. Kimberly, 9 J. R. 470. Hawley v. Cramer, 4 Cowen, 717. Porter v. Spencer, 2 J. Ch. R. 171.

[4] Bacon's Abr. title Accompt.

[5] Post v. Kimberly, 9 J. R. 470. Ludlow v. Simons, 2 Cai. Ca. in Error, 38, 39. Barker v. Dacie, 6 Ves. 687. Rathbun v. Warren, 10 J. R. 587, 595.

against his agent.[1] But where there is no mutuality of dealings, or but one item on one side, and no discovery is required, equity has no jurisdiction.[2] In one case, where a defendant, sued at law, and held to bail, was about to leave the state, with his bail, and leaving no property behind, the chancellor granted a *ne exeat*, and entertained jurisdiction upon the head of *account*. The chancellor remarked upon the general rule, saying, that to sustain a bill for an account, there must be *mutual demands*, and not merely payments by way of set-off. A single matter cannot be the subject of account. There must be a series of transactions on one side and of payments on the other. But he placed his interference in that case, upon the necessity of the case. From the facts charged and sworn to, "it appears to me," said the chancellor, "that the remedy in the suit pending at law would be absolutely defeated without the interposition of the court of chancery. The remedy sought is indispensable to prevent a failure of justice, and this makes a marked difference between this and ordinary cases. I should think that it would reflect discredit on the administration of justice, if the plaintiff could find no relief from the impending mischief, arising from the failure of the remedy at law, by the immediate removal of the defendant and his bail."[3]

Where there have been various dealings between *landlord and tenant*, so as to produce an account too complicated to be taken at law, and the landlord brings an ejectment for non-payment of rent, the tenant may file a bill before judgment at law, for an account, on the footing of these dealings, and to have the balance applied to the rent claimed to be due, and the tenant need not bring in the rent under the statute.[4]

Lord Cowper decreed an account in the case of *copper mines*, for ore dug and for timber cut, as being a *species of trade*.[5] And Lord Hardwicke said, that an account might be taken of a *colliery*, on the like ground.[6]

In cases where the accounts are complicated, and where the final settlement requires the accounts of more estates than one to be taken, Chancellor Walworth thought that the surrogate's court had no jurisdiction, and that such accounts could only be adjusted in a court of equity.[7] Complex and intricate accounts are, says Ch. J. Marshall, unfit subjects for an examination in court, and ought always to be referred to a commissioner, to be examined by him and reported, in order to a final decree.[8]

[1] Mackenzie v. Johnson, 4 Mad. R. 374.

[2] Cumming v. White, 4 Blackf. 356; S. P., 10 Yerger, 179.

[3] Porter v. Spencer, 2 J. Ch. R. 169, 171.

[4] 1 Mad. Ch. Pr. 71. O'Conner v. Spaight, 1 Sch. & Lef. 305 et seq. Corporation of Carlisle v. Wilson, 13 Ves. 276.

[5] Bishop of Winchester v. Knight, 1 P. Wms. 407.

[6] Story v. Lord Windsor, 2 Atk. 630.

[7] Foster v. Williams, 1 Paige, 542.

[8] Dubourg v. United States, 7 Peters, 625.

On the whole, it may be laid down as the general rule, deducible from what has been said, that equity entertains a general jurisdiction in matters of account, growing out of privity of contract, where there are mutual accounts; where the accounts are complicated and intricate; where the accounts are all on one side, and a discovery, or a writ of ne exeat, is prayed and granted; where the taking of an account of several estates is necessary; where multiplicity of suits renders the trial difficult, expensive and unsatisfactory at law. As a necessary consequence, where the accounts are all on one side, and no other relief is sought than to recover the amount, the remedy at law is adequate, and there is no ground for the interposition of equity.

In matters of account, it often becomes a material inquiry, where partial payments have been made, and there are several debts due by one party to the other, *who* is entitled to make the appropriation; and *how*, in case the parties omit to declare, at the time, their intention, the law will apply the payments.

It seems to be settled, that where money is paid by, or received for, a debtor, liable to the same creditor for distinct debts, by the creditor, the debtor may appropriate it to the payment of whatever debt he pleases. If the debtor omit to appropriate it, the creditor may apply it to the satisfaction of whichever demand he pleases. If neither party makes the appropriation, the court will appropriate it according to the equity of the case. This right of appropriation exists only between the original parties.[1]

Where a creditor has two demands against his debtor, and the debtor pays a sum of money, without directing to which it shall be applied, if the amount paid exceed one of the demands, and is exactly equal to what remains due on the other, it will be considered as having been paid in discharge of that other. This was put by the court upon the ground of a presumed intention of both the parties.[2]

This subject was fully discussed in the court of errors, in one case, and the unanimous opinion of the court was pronounced by Ch. J. Savage.[3] The case came up on appeal from the court of chancery, and, upon this branch of the case, the chief justice said: "There is no doubt but a person indebted to the same creditor on different accounts, or de-

[1] Gordon v. Hobart, 2 Story's Rep. 243. Bossanquet v. Wray, 6 Taunt. 597. Brooke v Enderby, 2 Br. & Bing. 70. Mann v. March, 2 Caines' Rep. 99.

[2] Roberts v. Garnie, 3 Caines, 14.

[3] Baker v. Stackpole, 9 Cowen, 485.

mands, making payment, may apply the payment to any demand he pleases; and if the debtor fails to make the application, or rather appropriation, the creditor may make such appropriation as he pleases. But if no appropriation is made by either, but the money is paid and received generally, on account, how does the law make the appropriation? In Godard v. Cox, (2 Str. 1194,) it was decided, that in such case the creditor has the right of applying, where there is no dispute about liability; but if the debtor is liable in one demand personally, and in another as executor, which depended on the question of assets, then the creditor cannot make the application to such demand. The case of Devaynes v. Noble, Clayton's case, (1 Merriv. 584 to 610,) gave rise to much discussion as to the rules governing the application of indefinite payments. Sir William Grant, master of the rolls, examined the subject at much length. He considered the rule of the civil law to be, that the election, whether by debtor or creditor, should be made *at the time of payment;* and if neither applied the payment when made, then the law made the payment on certain rules of presumption; and in applying presumption, the presumable intention of the *debtor* was first considered." This was upon the ground that the debtor had the first right to direct the appropriation. Accordingly, the application would be made to the most onerous debt, as for example, to one drawing interest, rather than to one without interest. "But it seems, by the common law, that when A. has a demand against B. and C. and a more recent demand against B. alone, who makes an indefinite payment, the law will appropriate the payment, first to the individaul debt, and the residue, if any, to the joint debt; though, if both debts were against B. alone, it might appropriate the payment to the oldest debt first. But in such case the creditor cannot wait till B. becomes further indebted, and then appropriate the payment to the future debt, leaving the previous one unpaid. In no case can a creditor, who receives payment generally, appropriate it to a debt created after the payment, leaving a prior demand unpaid."[1]

The subject of appropriation has often been discussed in the courts of the United States, where sureties of a public officer become liable at different periods, and the general doctrine was stated in one case, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice. It is certainly

[1] Baker v. Stackpole, 9 Cowen, 436. Peters v. Anderson, 5 Taunt. 596. Newmarch v. Clay, 14 East, 239.

too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori*, at the time of trial. In cases where long and running accounts, where debits and credits are constantly occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, the court held that payments ought to be applied to extinguish the debts according to the priority, so that the credits are to be deemed payments *pro tanto*, of the debts antecedently due.[1]

With respect to the time *when* the appropriation can be made by the parties, although the decisions are somewhat conflicting, it would seem that the weight of common law authority is in favor of the civil law rule; that the appropriation by the debtor should be made *at the time* the payment is made, and if he omits to do so, the creditor should make it either then, or within a convenient time after, and while it is indifferent to the debtor on which account it is made.[2] This seems to be the fair deduction from the opinion of Cowen, J., in Pattison v. Hull, where he has extensively reviewed the common law cases, and compared them with the civil law.

[1] U. States v. Kirkpatrick, 9 Wheaton, 720, 737.

[2] Pattison v. Hull, 9 Cowen, 747, 765–773. Moss v. Adams, 4 Iredell's Eq. 42. Ayres v. Hawkins, 19 Vt. 26. Millikin v. Tufts, 31 Maine R. 497.

[It may not be out of place here to recur to the civil law rule, on the subject of *imputation* of payments, as the term *appropriation* of payments, is expressed in that system. The text of the civil law on this subject is thus translated by Strahan from the French of *Domat*, Civil Law.(*a*)

"1. If a debtor who owes to a creditor different debts, hath a mind to pay one of them, he is at liberty to acquit whichever of them he pleases, and the creditor cannot refuse to receive payment of it. For there is not any one of them which the debtor may not acquit, although he pay nothing of all the other debts; provided he acquit entirely the debt which he offers to pay." This is precisely the common law, as the cases already cited establish.

"2. If, in the same case of a debtor who owes several debts to one and the same creditor, the said debtor, makes a payment to him, without declaring at the same time which of the debts he has a mind to discharge; whether it be that he gives him a sum of money indifferently in part payment of what he owes him, or that there be a compensation of debts agreed on between the creditor and debtor, or in some other manner; the debtor will have always the same liberty of applying the payment to whichever of the debts he has a mind to acquit. But if the creditor were to apply the payment, he could apply it only to that debt which he himself would discharge in the first place, in case he were the debtor. For equity requires that he should act in the affair of his debtor as he would do in his own. And if, for example, in the case of two debts, one of them were controverted and the other clear, the creditor could not apply the payment to the debt which is contested by the

(*a*) Domat, Cushing's ed. 905 et seq

The doctrine of the civil law, with respect to this subject, turns upon the intention of the debtor, either actual, or implied or presumed. To him belongs the right of making the appropriation, in the first instance, and which right he must exercise *at the time* of the payment, whether it be a payment in money, or any thing else agreed to be accepted in payment. If the debtor fails to make the appropriation, the civil law permits the creditor to apply the payment, but he must exercise the right *at the time* payment is made, and on the failure of the debtor to designate to which account he desires it to be applied. In doing this, the civil law treats the creditor as acting in behalf of the debtor, and requires him to apply the payment to that debt which he himself would discharge in the

debtor." The rule adopted by Chief Justice Lee in the case already cited, is substantially according to the foregoing rule.(*b*)

"3. In all the cases where a debtor owing several debts to one and the same creditor is found to have made several payments, of which the application has not been made by the mutual consent of the parties, and where it is necessary that it be regulated either by a court of justice or by arbitrators; the payments ought to be applied to the debts, which lie heaviest on the debtor, and which it concerns him most to discharge. Thus, a payment is applied rather to a debt of which the non-payment would expose the debtor to some penalty, and to costs and damages, or in the payment of which his honor might be concerned, than to a debt of which the non-payment would not be attended with such consequences. Thus, a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what the debtor is singly bound for without giving any security; or to the discharge of what he owes in his own name, rather than of what he stands engaged for as surety for another. Thus, a payment is applied to a debt for which the debtor has given pawns and mortgages, rather than to a debt due by a simple bond or promise; rather to a debt of which the term is already come, than to one that is not yet due; or to an old debt before a new one; and rather to a debt that is clear and legal, than to one that is in dispute; or to a pure and simple debt, before one that is conditional." Every position in the foregoing is in substance sustained by authorities under the common law.(*c*)

(*b*) Godard v. Cox, 2 Str. 1194. But see Logan v. Mason, 6 Watts & Serg. 9, where it is said that the provisions of the Roman law, which, in the application of a payment, requires the creditor, when the right has devolved on him by the laches of the debtor, *to consult the debtor's interest* in preference to his own, has not been adopted as part of the common law. The case of Ayers v. Hawkins, 19 Vt. 26, is more in conformity to the civil law; and to the same effect is Dows v. Morewood, 10 Barb. 183; Hunter v. Osterhout, 11 id. 34; Seymour v. Marvin, id. 80. And see opinion of Chancellor Walworth, in Stone v. Seymour, 15 Wend. 29, disapproving, in part, of the Roman rule.

(*c*.) Bussey v. Grant, 10 Humph. 238. Heyward v. Lomax, 1 Vern. 24. Marryatts v. White, 2 Stark. R. 101. Bacon v. Brown, 1 Bibb, 334. Gwinn v. Whittaker, 1 Harr. & John. 754. Postmaster Gen. v. Norvell, Gilp. 106. Briggs v. Williams, 2 Vt. 283. U. S. v

first place, in case he were the debtor.[1] It is denied, by some courts, that this principle has been adopted by the common law.[2] The rule, however,

[1] See ante.
[2] Logan v. Mason, 6 Watts & Serg. 9. Per Walworth, in Stone v. Seymour, 15 Wend. 29.

"4. When a payment made to a creditor to whom several debts are due, exceeds the debt to which it ought to be applied, the surplus ought to be applied to the discharge of the debt which follows, according to the order explained in the preceding article, unless the debtor makes another choice."

"5. If a debtor makes a payment to discharge debts which, of their nature, bear interest, such as that of a marriage portion, or what is due by virtue of a contract of sale, or the same be due by a sentence of a court of justice, and the payment be not sufficient to acquit both the principal and the interest due thereon, the payment will be applied, in the first place to the discharge of the interest, and the overplus to the discharge of a part of the principal sum."

"6. If in the cases of the foregoing articles the creditor had given an acquittance in general for principal and interest, the payment would not be applied in an equal proportion to the discharge of a part of the principal, and of a part of the interest; but, in the first place, all the interest due would be cleared off, and the remainder would be applied to the discharge of the principal."

The doctrine of the preceding paragraphs is perfectly naturalized by cases of the most approved authority.(*d*)

"7. When a debtor obliging himself to a creditor for several causes at one and the same time, gives him pawns or mortgages, which he engages for the security of all the debts; the money which is raised by the sale of the pawns or mortgages, will be applied in an equal proportion to the discharge of every one of the debts. But if the debts were contracted at divers times, upon the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts, what should remain of the pledge after payment of the first, the moneys arising from the pledges, would in this case be applied, in the first place, to the discharge of the debt of the oldest standing. And both in the one and the other case, if any interest be due on account of the debt which is to be discharged by the payment, the same will be paid before any part thereof be applied to the discharge of the principal."

This paragraph contains the peculiar doctrine of priority of pledges, and follows out the principles already stated. The proposition that a payment on pawns, or mortgages for simultaneous debts, shall be distributed between the debts, has been in principle decided in the English courts, and in the courts of this state.](*e*)

Kirkpatrick, 9 Wheat. 720. Frazier v. Hyland, 1 H. & J. 98. Alston v. Conter, id. 351 Fairchild v. Holly, 10 Conn. 175. Hilton v. Burley, 2 N. Hamp. 193.

(*d*) State of Connecticut v. Jackson, 1 J. Ch. C. 17. Chase v. Box, 2 Freem. 261 Stoughton v. Lynch, 2 J. Ch. R. 209. Frazier v. Hyland, 1 Harr. & John. 98. Peebles v Gee, 1 Dev. 341. Spicer v. Harnott, 8 Watts & Serg. 17. Bond v. Jones, 8 Sm. & Marshall, 368. Jenks v. Alexander, 11 Paige, 619. Righter v. Stall, 3 Sand. Ch. R. 608.

(*e*) Perry v. Roberts, 2 Ch. Cas. 84; S. C., 1 Vern. 34. Dows v. Morewood, 10 Barb 183. Pattison v. Hull, 9 Cowen, 747.

goes but little further than other courts maintain the duty of the creditor in such cases to be, namely, that he should act with good faith towards the debtor. Thus, in a recent case, it was held that, if a debtor, owing several demands to his creditor, makes a general payment and neglects to direct its application, the right of designation belongs to the creditor; *yet he must make an application, to which the debtor could not justly or reasonably object.* Therefore, where the demands consisted of three notes, all of which were barred by the statute of limitations, and the debtor made a general payment, it was held that the creditor might apply it upon which notes he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent, in date, to the others, and that the effect would be to take the note, upon which the application was made, out of the statute of limitations; *but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute.*[1]

In Newhampshire it has been decided, that if payments have been made on account of illegal sales, (for example, for spirituous liquors sold without license,) the purchaser cannot afterwards rescind them, nor insist upon their being applied to other and legal charges. The general rule is there stated thus: a debtor, paying money to a creditor, who has several claims against him, may direct the application of the payment to which claim he pleases. If the debtor makes no such application, the creditor may, *at the time*, apply it to any demand then due and payable, and which is a lawful claim. Where neither of the parties makes the application, the law will, where there is no particular equity, or reason for a different course, apply the payment to the earliest debt. Whether the creditor can direct the application *at any other time* than at the time of payment, the court did not decide, and left under a quere.[2] In New-York it has been held, in one case, that the creditor is not bound to make an immediate decision, but will be allowed a reasonable time to decide to which account or debt he will place it.[3] But Chancellor Walworth, in an earlier case,[4] while delivering the judgment of the court of errors, held, that the creditor should make the appropriation, *on receiving the payment*, and on the default of the debtor to direct the application. This is in conformity to the civil law, and is the more reasonable rule.

That a creditor cannot make the appropriation of a payment *after* a

[1] Ayers v. Hawkins, 19 Vt. 26.

[2] Caldwell v. Wentworth, 14 N. H. 431.

[3] Allen v. Culver, 3 Denio, 291. Coll. on Partnership, 322.

[4] Stone v. Seymour, 15 Wend. 23.

controversy has arisen thereon, between himself and the debtor, is quite reasonable, and has been settled.[1] He should either make it at the time of the payment, on the failure of the debtor to apply it, as held by Chancellor Walworth, (supra,) or, at least, before the rights of the parties have been changed.

Where neither party has made the application, the law usually makes it to the oldest debt, and also applies it to the debt from which it will be most beneficial to the debtor to be relieved; as, for example, to acceptances for which an instrument in the nature of a mortgage or pledge is given.[2]

In like manner, payments made on account of rent generally, will, in the absence of any direction by the tenant, and any agreement of the parties, be applied *by the law* on the rent due at the time, and not on the rent then accruing.[3]

Chief Justice Marshall, in an early case before the supreme court of the United States, expressed dissatisfaction with the rule of the civil law, which makes the application in a manner most favorable to the debtor, in case both the debtor and creditor omitted to make the application of a payment.[4] He said: "Where a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish, first, those debts for which the security is *most precarious*." In a case in the court of errors, in the state of New-York, Chancellor Walworth, who delivered the prevailing opinion, agreed that the foregoing doctrine of Chief Justice Marshall is the true principle.[5] He admitted that, in Spain, France, and Holland, the rule of the civil law prevails, requiring the payments to be applied in that way which is most beneficial to the debtor, where one debt is more onerous than the other. Such too is the Code Napoleon, article 1256. By the

[1] Millikin v. Tufts, 31 Maine, 497.

[2] Gwin v. Whittaker, 1 Har. & J. 754. McTavish v. Carroll, 1 Maryland Ch. Decisions, 160. Bussey v. Gant, 10 Humph. 238. Truscott v. King, 2 Seld. 147. Dows v. Morewood, 10 Barb. 183. Patterson v. Hull, 9 Cowen, 747, and cases cited under note, ante, p. 95.

[3] Hunter v. Osterhout, 11 Baro. 33 Allen v. Culver, 3 Denio, 291.

[4] Field v. Holland, 6 Cranch, 8, 27.

[5] Stone v. Seymour, 15 Wend. 29; S. P., Jones v. Kilgore, 2 Richardson's Eq. 63. Baine v. Williams, 10 S. & M 113.

civil code of Louisiana, no preference is given on account of priority of date; but when both debts are not of a like nature, the imputation is made to the less burdensome; and if all things are equal, it is made proportionably.[1] By the law of Scotland, the creditor is allowed to make the application which is most beneficial to himself. The rule adopted there, has in view the interest of the creditor more than that of the debtor, except that a debt in judgment must be first paid. Also when a third person is a surety for one of the debts the payment is applied *pro rata*; the interest of the surety counterbalancing that of the creditor. The chancellor admits, that in England and in the United States, where the common law prevails, there is much conflict in the decisions, as to the principles upon which the court is to make the application, where the right is not exercised by the creditor or debtor.[2]

In the same case, the same learned chancellor, speaking of the application of indefinite payments where the creditor has different claims against his debtor, says, that some of the fundamental principles of the civil law appear to have been adopted every where, and to admit of no doubt. (1.) If both debts are due at the time of the partial payment, the debtor is at liberty to apply the payment to which he pleases, if his intention is manifested at the time of the payment; subject to this restriction, however, that the creditor is not obliged to receive a partial payment of any particular debt, of which the whole is due at the time the offer of payment is made. (2.) When the debtor neglects to manifest his intention, as to the application of the payment, *at the time it is made*, the creditor may, *at the time he receives the money*, apply it to which debt he pleases, unless the debtor objects; the creditor manifesting his intention *at the time*, either in the acquittance which he gives, or in some other way. (3.) If a partial payment is made, on account of debts, one part of which debts consists of principal, and another of the interest, so much of the payment as is necessary to satisfy the interest, or arrears then due, shall be first applied for that purpose, and the residue only shall go to reduce the amount of the principal debt. These rules prevailed in the Roman law, and are now the settled law of France, Spain, Holland, Scotland, England and the United States.[3] A fourth principle appears to be equally well established, to wit, where no application of the payment is made by the debtor, or with his assent, at the time it is received, and there is an existing indebtedness to the amount of such payment, it shall

[1] Civil Code of Louisiana, art. 2162.

[2] Stone v. Seymour, 15 Wend. 30.

[3] Id. 23, 24, where the late chancellor has collected various authorities on the above points.

be applied to that; and neither the creditor or the court shall apply such payment to a debt which was not then due and payable. And if the payment is made upon a demand which draws interest, and neither the principal or the interest has yet become due, it shall be applied ratably, so as to extinguish the interest to that time upon so much of the principal as is discharged by the payment.[1]

The points on which there is the greatest conflict of opinion among the courts, in this country, are as to the time *when* the creditor, on the laches of the debtor, is permitted to make the appropriation; that is, whether he must make it *at the time he receives the payment*, and indicate his appropriation to the debtor at the time; or whether he may wait a *reasonable time*, before making the application; or, whether he may lie by, until a *controversy has arisen* between the parties, and then desig nate the demand to which the payment shall be applied. Another point in which there is a controversy, is as to the character in which the creditor acts, when on failure of the debtor to direct the appropriation, he exercises the admitted right of directing it himself; that is, whether, in this case, he acts for his own interest exclusively, and may prefer his own interest to that of the debtor; or whether he is bound to act with good faith towards the debtor, and so exercise his own right as not to prejudice the rights of the debtor; or whether he is bound to exercise the golden rule, and do by the debtor, in making the appropriation, as he would desire others to do for himself, under similar circumstances.

There are respectable authorities in this country for each of the foregoing positions. But it is believed that the tendency of judicial opinion, in this country, is towards the equitable rules of the civil law. In most instances those rules have been adopted by common consent, and are perfectly naturalized in the common law. Where they have not been, in terms, adopted, the preponderance of authority is in their favor. In the present state of the law, the rules on this subject cannot be laid down more definitely than they have been in the text. The studious reader will consult the cases already cited, and those which are appended in the subjoined note.[2]

[1] Stone v. Seymour, 15 Wend. 23, 24, and Williams v. Houghtaling, 3 Cow. 86.

[2] Reynolds v. McFarlane, 1 Overt. 488. Bacon v. Brown, 1 Bibb, 334. Postmaster General v. Norvell, Gilp. 106. Huger v. Bosquet, 1 Bay, 497. Harker v. Conrad, 12 S. & R. 301. United States v. Kirkpatrick, 9 Wheat. 720. Cramer v. Higgison, 1 Mason, 323. Gwin v. Whitaker, 1 Har. & J. 754. Briggs v. Williams, 2 Vt. 283. Frazier v. Hyland, 1 Har. & J. 98. Alstan v. Conter, 4 id. 351. Fairchild v. Holly, 10 Conn. 175. Postmaster Gen. v. Furber, 4 Mason, 332. Blackstone Bank v. Hill, 10 Pick. 129. Hall v. Marston, 17 Mass. 575. Gilchrist

In the case of partnership, where there has been a change of the firm by a dissolution, by death or otherwise, it becomes important to ascertain the principle on which indefinite payments are to be applied. In one case, Bayley, J., after stating the general rule, about which there is no dispute, says, that when one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments, made from time to time by the surviving partners, must be applied to the old debt.[1] In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In such case, in a current account as between banker and customer, the law makes an appropriation according to the items of the account, the first item on the debit side of the account being discharged, or reduced by the first item on the credit side. These general principles were fully established and enforced by

v. Ward, 4 Mass. 692. Bonaffe v. Woodbury, 12 Pick. 463. Hussey v. Manu. and Mech. Bank, 10 id. 415. Taylor v. Sandiford, 7 Wheat. 13. Black v. Schooles, 2 McCord, 292. Martin v. Draker, 5 Watts, 544. Mitchell v. Dall, 2 Har. & Gill, 159; S. C., Gill & John. 361. McDonald v. Picket, 2 Bailey, 617. Reed v. Boardman, 20 Pick. 441. Brewer v. Knapp, 1 id. 332. Brady v. Hill, 1 Miss. 315. Alexander v. Patten, 4 Cranch, 316. Smith v. Souven, 1 McCord, 308. Blinn v. Chester, 5 Day, 166. Dorsey v. Ganaway, 2 Har. & J. 402. Emery v. Tichout, 13 Vt. 15. Oliver v. Phelps, 1 Spencer, 180. McFarland v. Lewis, 2 Scam. 344. White v. Trumbull, 3 Green, 314. Carson v. Hill, 1 McMullan, 76. Sellick v. Turnpike Co. 13 Conn. 453. Rosseau v. Call, 14 Vt. 83. Robinson v. Doolittle, 12 id. 246. Starrett v. Barber, 7 Shipherd, 457. Arnold v. Johnson, 1 Scam. 196. Merrimack Co. Bank v. Brown, 12 N. H. 320. Myers v. United States, 1 McLean, 493. Howland v. Rench, 7 Blackf. 236. Rackley v. Pearce, 1 Kelly, 241. Randall v. Passmore, 1 Branch, 409. Boody v. The U. S. 1 Woodb. & M. 150. Rood v. Jones, 8 S. & M. 368. Upham v. Lefavour, 11 Met. 174. Jenck v. Alexander, 11 Paige, 619. Moss v. Adams, 4 Iredell's Eq. 42. Jones v. Kilgore, 2 Rich. Eq. 63. Baine v. Williams, 10 S. & M. 113. United States v. Bradbery, Davies, 146. Bancroft v. Dumas, 21 Vt. 456. Dulles v. De Forrest, 19 Conn. 190. Bailey v. Wynkoop, 5 Gilman, 449. Sawyer v. Tappan, 14 N. H. 352. Seymour v. Marvin, 11 Barb. 80.

The foregoing are American cases. Many of the English cases are cited already, in addition to which, see Mills v. Foukes, 7 Scott, 444; S. C., Bingham's N. C. 455, repudiating the rule of the civil law, which applies a payment to the more burdensome debt, when the parties have omitted to make the application. Peters v. Anderson, 5 Taunt. 596. Bossanquet v. Wray, 6 id. 597. Clayton's case, 1 Meriv. 572. Chitty v. Naish, 2 Dowl. P. C. 511. Brazier v. Bryant, id. 477. Goddard v. Hodges, 1 C. & M. 33. Cruickshanks v. Rose, 1 M. & Rob. 100.

[1] Simpson v. Ingham, 2 B. & Cress. 65

Sir William Grant, in Clayton's case,[1] "which was a case decided upon great consideration, and is an authority of great weight."[2] There, the claim of Clayton against the estate of the deceased partner Devaynes, under an account current with the house of Devaynes & Co., was limited and adjusted according to the principles above stated. In that case Sir William Grant says: "This is the case of a banking account, where all the sums paid in, form one blended fund, the parts of which have no longer any distinct existence. There is no room for any other appropriation, than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account, that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance, due on a given day, has or has not been discharged, but by examining whether payments to the amount of the balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of the foot of it. A man's banker breaks, owing him on the whole account a balance of £1000. It would surprise one to hear the customer say: I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000, which I paid in five years ago, that I hold myself never to have drawn out; and, therefore, if I can find any body, who was answerable for the debts of the banking house, such as they stood five years ago, I have a right to say, that it is that specific sum which is still due to me, and not the £1000 I paid in last week."[3]

The doctrine of Sir William Grant, in Clayton's case, (supra,) was apparently approved by Savage, Ch. J., in Baker v. Stackpole, (supra,)[4] by Judge Story, in his Treatise on Equity Jurisprudence,[5] and by the superior court of errors of Connecticut.[6] In the case of Fairchild v. Holly and others, one of the defendants, a dormant partner, withdrew from the concern, the former then being indebted to the plaintiff, on a running

[1] 1 Merivale, 572.

[2] Per Abbott, J. in Bodenham v. Purchase, 2 Barn. & Ald. 46.

[3] Sir William Grant, in Clayton's case, 1 Meriv. 608, 609. Bodenham v. Purchase, 2 Barn. & Ald. 39. Pemberton v. Oakes, 4 Russell's R. 154. Wilder v. Keeler, 3 Paige, 167.

[4] Baker v. Stackpole, 9 Cowen, 436.

[5] Story's Eq. Jur. § 459, e.

[6] Fairchild v. Holly, 10 Conn. 175, 182.

account of debits and credits. After the withdrawal of the dormant partner, the business of the defendants was conducted in the same ostensible manner, by the same agent, and no rest or settlement was made in the accounts. The payments, however, made subsequent to the withdrawal of the partner, if applied to the old account, would extinguish it, and leave a small sum to be applied on the account of the new firm. The question was, whether those subsequent payments, not having been applied at the time by the parties, should be appropriated by the law to the whole account, and thus go to extinguish the old account; or whether the account should be stated of debits and credits, as the account stood when the partner withdrew, and the payments, subsequent to the withdrawal, be applied to the debts which had subsequently accrued. The former was held to be the true rule in this case; the account of the plaintiff was whole and unbroken. No rest was made, or balance struck. The charges were made in the same manner, and against the same persons, and the business conducted by the same agent. The case was not distinguishable from Brooke v. Enderby et al.,[1] and was in accordance with the principles approved in Clayton's case, and Simpson v. Bingam, (*supra.*)

The principles which apply, in case of the death or the retiring of a partner, are the same on the *accession* of a new partner. If the money paid be the property of the mere partnership, it will be applicable to the payment of the debts of that partnership alone. The general rule, says Lord Ch. J. Abbott,[2] is, that where money is paid generally, without any appropriation, it ought to be applied to the first items of the account; but the rule is subject to this qualification, that where there are distinct demands, one against persons in partnership, and another against only one of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual; that would be allowing the creditor to pay the debt of one person with the money of others." The question in such case is, whether the money was the property of the partnership, or of the individual, making the payment. In the absence of any specific direction by the debtor, the law would apply it, in the first case, to the partnership debt, and in the last, to the individual debt. This is in accordance with the general principles of equity, that partnership property must first be applied to the payment of partnership debts, and the individual property of the partners to their individual debts.[3] Of this, more will be said in its proper place.

[1] Brooke v. Enderby, 2 Br. & Bing. 70.

[2] Thompson v. Brown, 1 Moo. & M. 40.

[3] Wilder v. Keeler, 3 Paige, 167. Kirby v. Schoonmaker, 3 Barb. Ch. R. 46. Eg-

The subject of agency gives rise to a variety of questions under the head of accounts, with reference to the application of payments. The agents with which equity is most conversant, are attorneys, factors, bailiffs, consignees, receivers, stewards.[1] The general rule, to be departed from only under special circumstances, is, that a person standing in this relation to his employer, is bound to keep regular accounts, not only of payments but of receipts, and not to confound the property of his principal with his own. In cases of gross neglect in this respect it has been said, that the agent shall not be permitted to charge costs; and if he improperly confound the property of his principal with his own, he is chargeable with the whole.[2] Chancellor Kent, in Hart v. Ten Eyck[3] said, "The rule of law and equity is strict and severe on such occasions If a party, having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconvenience is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it."

In many cases falling under the head of agency, where the transaction is simple, and consists only of a few items, the ordinary remedy at law will afford complete redress. The action of debt, covenant or assumpsit, or a corresponding action under the code, will enable the complaining party to establish his rights, and obtain satisfaction for any injury he may have sustained. But there are numerous other cases, of a different character, complicated in their nature, and requiring equitable relief. Sometimes a discovery, an injunction or a ne exeat is required; at others, a multiplicity of suits is to be avoided; and at others, more full and adequate relief is required than can be granted in an ordinary action at law. The circumstances which will, in general, give a preference to equitable over legal relief, have been adverted to already, and the general principles have been set forth.[4]

The cases of account between tenants in common, between joint tenants, between partners, between part owners of ships, and between the owners of ships and the masters, sometimes fall under the consideration of agency, and sometimes under that of partnership. Thus, in Mumford v. Nicoll,[5] it was held that though the part owners of a ship are, generally

berts v. Wood, 3 Paige, 517. Deveau v. Fowler, 2 id. 400. Tunns v. Trezevant, 2 Desaus. 270. Woddrop v. Price's Ex'rs, 3 id. 203. Simmons v. Tongue, 3 Bland's Ch. R. 356.

[1] Jeremy on Eq. Juris. B. 3, pt. 2, ch. 5, pp. 513 to 515. Story's Equity, § 462.

[2] White v. Lincoln, 8 Ves. 363. Lupton v. White, 15 id. 432.

[3] Hart v. Ten Eyck, 2 J. Ch. R. 108.

[4] See ante, pp. 90 to 02.

[5] 20 J. R. 611. Doddington v. Hallet, 1 Ves. 497. Abbott on Shipping, 6th Am. ed. 137, 138, and notes.

speaking, tenants in common, yet there may be a special partnership between them, in the ship, as well as in the cargo, in regard to a particular voyage, or adventure, and in the proceeds arising from the sale of them, and the profits of the voyage. And when, in such a case, one of two owners receives or gets possession of the whole proceeds, he has a right to retain them until he is paid or indemnified for what he has advanced, or paid more than his share, for outfits, repairs, or expenses of the vessel for the particular voyage, or adventure; but not for a general balance of account arising from former and distinct voyages, or adventures in which they have been concerned together, in the same, or other vessels, there being no general partnership between them, and each adventure creating a special partnership, by itself, which terminated with the particular adventure.

The question with respect to what liens are created, by operation of law, upon a vessel, was much considered in a recent case in the supreme court of New-York.[1] After stating that the relation of part owners of a vessel to each other was that of tenants in common, and not joint tenants; and that with respect to partners, it might be laid down, as a general principle, that each of the partners has a *specific lien* in the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount, for the use of the copartnership, it was said by the court: "In Doddington v. Hallet, (1 Ves. sen. 407,) Lord Hardwicke extends this doctrine to part owners of ships, holding, in a case where one of several part owners died, without paying his proportion of the expense of building and fitting out a ship, that the other part owners had a specific lien on his share, for the moneys which they had laid out on his account. But Lord Eldon, after great consideration, overruled this decision of Lord Hardwicke, being of opinion that part owners of a ship, being tenants in common and not joint tenants, have not, by analogy to partners, a lien on the shares of each other." (Ex parte Young, 2 Ves. & Beame, 242. Ex parte Harrison, 2 Rose, 76. Coll. on Part. 666, a.) Judge Story gives his preference to the doctrine laid down by Lord Hardwicke, as most consonant to equity, and as founded in principle, public policy and convenience. He treats cases of this kind as a species of partnership with reference to the adventure upon which the ship is to be employed; and therefore, the repairs, outfits and other expenses incurred to accomplish the enterprise, are deemed to be made on general account, and intended to be governed, as to rights and liens, by the rules of strict part-

[1] Tisdale v. Grant, 12 Barb. 414, 425.

nerships. (Story on Partnerships, § 444.) Chancellor Kent followed the rule of Lord Eldon, in Nicoll v. Mumford, (4 J. Ch. R. 522,) but his decree was modified by the court of errors, and the rule adopted by Lord Hardwicke sustained. (20 J. R. 611, S. C.) Ch. J. Spencer, in delivering the prevailing opinion in the court of errors, said, that he did not intend to overrule the distinction between partners in goods and merchandise, and part owners of a ship. The former are joint tenants, and the latter are, generally speaking, tenants in common; and one cannot sell the share of the other. "But I mean to say," he observes, "that part owners of a ship may, under the facts and circumstances of this case, become partners as regards the proceeds of the ship; and if they are to be so regarded, the right of one to retain the proceeds, until he has paid what he has advanced, beyond his proportion, is unquestionable." In that case the question arose between the part owners who had made the advances for outfits, repairs and expenses, and received the whole avails of vessel and cargo, and the assignees under the insolvent act, of the other part owners. There was a strong equity in favor of treating the vessel as well as cargo as the partnership stock, and thus enabling the part owner, by whose means the fund had been acquired, to be reimbursed, before the creditors of the insolvent part owners could be permitted to come in for a share.

We now pass from this to another branch of the subject, that of contribution and exoneration.

If the liabilities of two or more persons be joint, he who has paid more than his share is entitled to *contribution* from the rest. If some are liable in priority to the rest, the parties secondarily liable, if compelled to discharge the claim, are entitled to exoneration.[1] The subject of *contribution* and *exoneration* arises properly under the head of Account, and both may be treated together.

In order that either of these equities should arise, it is essential that the charge be binding, and that it do not arise *ex delicto.*

This subject was well considered by Chancellor Kent, in an early case.[2] The principle of contribution, says the chancellor, is equality in bearing a common burden, but equality is not equity between two defendants who stand on different ground. They must stand *in equali jure*, or the rule does not apply. A court of law will now sustain an action for contribution between two debtors, or sureties, under an implied assumpsit arising from the knowledge and operation of the general principle that *equality*

[1] Adams' Equity, 267, 495.

[2] Peck v. Ellis, 2 J. Ch. R. 136, 137.

is equity. But a court of law will not sustain an action between two joint trespassers. If A. recover in *tort* against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution.[1] Chancellor Kent, in the same case,[2] approved of that decision, and said he was not apprised of any decision in chancery to the contrary. In Philips v. Briggs, (Hard. 164,) a bill was filed by one of the sheriffs of Middlesex against the other, for contribution, in a case where the damages had been levied on one for an escape suffered by both, and the court of exchequer considered it a case of the first impression, and doubted, and no decision appears to have been made. But in a later case[3] the master of the rolls observed, that where entire damages are recovered against several defendants for a tort, a court of justice will not interfere to enforce contribution among the wrongdoers. The wisdom and policy of the rule are thus vindicated by the chancellor in the same case: "There would be no safety to property, if a large combination of trespassers were entitled to the assistance of courts of justice in the apportionment of the damages. The knowledge that each individual is responsible for the whole, constitutes the great check."

Chancellor Walworth, in a case before him, of contributions among sureties, said: "The equitable principles of the civil law as to suretiship, have long since been established as the law of the court of chancery upon that subject. One of the fundamental principles of that law is, that co-sureties are bound to contribute equally, as between themselves, to the discharge of the common burden; and another is, that if one surety pays the whole debt for which they were jointly bound, he is entitled to a cession of the rights and remedies of the creditor, not only as against the principal debtor, but also as against his co-sureties. According to the modern doctrine on this subject, the surety, by the mere payment of the debt, and without any actual assignment from the creditor, is in equity subrogated to all the rights and remedies of the creditor, for the recovery of his debt against the principal debtor or his property, or against the co-sureties or their property, to the extent of what they are equitably bound to contribute."[4]

Where two are bound for the payment of a specific sum, and one pays the whole, he can either at law or equity call upon the other to contribute, and thus recover a moiety of what he had paid.[5] In cases of contribution of one surety against others, a court of equity still retains jurisdiction,

[1] Merryweather v. Nixon, 8 D. & E. 186.

[2] Peck v. Ellis, 2 J. Ch. R. 136. Lingard v. Bromley, 1 Ves. & B. 117. Miller v. Finton, 11 Paige, 18. Depuy v. Johnson, 1 Bibb, 562.

[4] Cuyler v. Ensworth, 6 Paige, 32.

[5] Owens v. Collinson, 3 Gill & John. 25.

in North Carolina, notwithstanding the statutory jurisdiction of courts of law.[1] The principle on which contribution is allowed, is that the plaintiff, by his payment, has removed a common burden from the defendant and himself; and the defendant has received a benefit from such payment.[2]

At law, when there are more than two sureties, and one pays the whole debt, the principal being insolvent, he cannot bring an action against his co-sureties jointly, but each must be sued separately for his own liability.[3] A different rule prevails in equity.[4] And a creditor suing at equity upon a joint, or joint and several undertaking, must bring all the debtors before the court, principals as well as sureties, for no account taken would be binding upon an absent party, and consequently, no complete decree could be made. Besides, the debtors are entitled to the assistance of each other in taking the accounts, and when one has paid more than his share of the debt, he is entitled to a contribution from him who has paid nothing, or less than his share; and by making all the debtors parties, the circuity of another suit for contribution is thereby avoided.[5] Sureties have a common interest in the relief sought, and that is enough to obviate the charge of multifariousness.[6]

As a general rule, a creditor cannot be compelled, in equity, to resort in the first instance to the principal, or his property, before he can enforce his remedy against the surety.[7] He can do no act to invalidate or discharge the security he has taken from the principal debtor, to the prejudice of the rights of the surety.[8] The surety may resort to equity, if he apprehends danger from the creditor's delay, and compel the creditor to sue the principal debtor, though probably he must indemnify the creditor against the consequences of risk, delay and expense.[9] The surety, says Chancellor Kent, in the last mentioned case, "has a right on the day the debt is due, to come into chancery and insist on its being put in suit; and if the obligee has suspended that right, by a new agreement with the debtor, he has disabled himself to do that equity to the surety which

[1] Shepherd v. Monroe, 2 Cas. Law Rep. 324.

[2] Souven v. Joyner, 1 Hill's Ch. R. 260.

[3] Powell v. Mathis, 4 Iredell, 83.

[4] Craythorn v. Swinburn, 14 Ves. 164. Dias v. Bochaud, 10 Paige, 445.

[5] Pitman on Prin. and Surety, 234, 235. Cockburn v. Thompson, 16 Ves. 321. O'Cand's case, Amb. 61. Bland v. Winter, 1 Sim. & Stu. 246. Plunket v. Penson, 2 Atk. 51.

[6] Conro v. Port Henry Iron Co., 12 Barb. 27.

[7] Champion v. Brown, 6 J. Ch. R. 406. Ranelaugh v. Hays, 1 Vern. 189; S. C., 2 Ch. Cases, 146. Pitman's Prin. and Surety, 125, and cases cited. Hayes v. Ward, 4 J. Ch. R. 131, 136.

[8] Hayes v. Ward, 4 J. Ch. R. 130.

[9] Id. King v. Baldwin, 2 id. 562.

he had a right to demand, and which the relation between the surety and debtor required. This principle is equally available at law and in equity. In order to discharge a surety in consequence of a variation of the contract by the creditor and debtor, not only must the fact of suretiship exist, but it must be known to the creditor at the time of the extension. If the fact do not appear on the face of the security, it must be proven clearly. Though the surety be not personally bound, but has only mortgaged or pledged his property by way of security for the debt of another the general principle applies, and the property is released, by a binding agreement of the principal, without the assent of the surety, extending the time of the payment. Giving time, says Nelson, J., in the same case, by a valid and binding agreement, by the creditor to the debtor, without the assent of the surety, operates to discharge him, both at law and in equity; and that, not only whether any loss has thereby happened to the surety or not, but even if it have been an actual benefit.[1]

The right of exoneration arises between surety and principal, so soon as the surety has paid any part of the debt. Immediately, on making such payment, he may bring assumpsit at law against his principal for indemnity.[2]

The same equity which enables a surety, after payment by himself, to recover the amount from his principal, warrants him in filing a bill to compel payment by the principal, when he has been brought under liability by the debt falling due, though he may not have been actually sued.[3]

At law, a surety, as such, cannot call on his principal, until he has actually paid the money.[4] The remark of Paige, J., in Elwood v. Dieffendorff,[5] that a surety has *no cause of action* against the principal debtor until he has actually paid the debt, must be understood as meaning a cause of action, *at law, for money paid.* The drift of the opinion, and the references, show that such was the point on which the judge was

[1] Gahn v. Niemcewicz, 11 Wend. 312; affirming S. C., 3 Paige, 614. Ries v. Berrington, 2 Ves. jun. 540. Boutbee v. Stubbs, 18 Ves. 21. Samuell v. Howarth, 3 Merivale, 278. Theobold on Prin. and Surety, 134, 135, 150. Elwood v. Dieffendorff, 5 Barb. 398. Rathbone v. Warren, 10 J. R. 587. Robinson v. Frost, 14 Barb. 536.

[2] Toussaint v. Martenant, 2 T. R. 100 Exall v. Patridge, 8 id. 176. Tom v Goodrich, 2 J. R. 213.

[3] Adams' Eq. 270, 502, Phil. ed. Pitman's Prin. and Surety, 125. Antrobus v. Davidson, 3 Meriv. 569, 578. King v. Baldwin, 2 J. Ch. R. 562.

[4] Powell v. Smith, 8 J. R. 249.

[5] Elwood v. Dieffendorff, 5 Barb. 410.

dwelling. He was not considering the remedy in equity, of the surety against the principal, *before* payment.

It is a general rule, that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; this rule applies only to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. Where a bond is given by principal and surety, and at the same time a mortgage made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee.[1] In another case,[2] Lord Brougham said: "Where a person pays off a bond in which he is either co-obligor or *subsidarié*, he has, *at law*, an action against the principal for money paid to his use, and he can have nothing more. The joint obligation towards the creditor is held to give to the principal notice of the payment, and also to prove his consent or authority to the making of that payment. This is necessary for enabling any man, who pays another's debt, to come against that other, because a person cannot make himself the creditor of another by volunteering to discharge his obligations. But beyond this claim, which is on simple contract merely, there exists none against the principal by the surety who pays his debt; nor, where the matter is closely viewed, ought there to exist any other." "The case standing thus at law, do considerations of equity make any alteration in its aspect? The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put his right of substitution too high, and the right results more from equity than from contract or *quasi* contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the court, in this respect, was luminously expounded in the argument of Sir Samuel Romily, in Craythorn v. Swinburne, (14 Ves. 160;) and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. A surety, to use the language of Sir S. Romily's reply, will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of the contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there

[1] Copis v Middleton, 1 T. & Russell, 224.

[2] Hodgson v. Shaw, 3 Myine & Keene, 183.

was no stipulation for that; and to avail himself of all those securities against the debtor." (14 Ves. 162.) The chancellor admits the rule to be, that when the surety to a bond pays off the bond, the obligation is extinguished, and no action will lie upon it. But though the bond is extinguished, the surety is entitled to all collateral securities which the obligee had against the original debtor. While his remedy against the principal is for money paid to his use, he can, nevertheless, enforce the securities thus taken. This doctrine was affirmed by Paige, J., in Elwood v. Dieffendorff, (supra.)[1]

The doctrine of Lord Brougham, in Hodgson v. Shaw, (supra,) was approved by the court of appeals of New-York in a recent case.[2] The right of the surety thus to be subrogated, on payment of the debt, to the securities held by the creditor, does not, the court said, depend upon contract, but rests upon principles of justice and equity. It is well and firmly established in the jurisprudence of this country and England.[3]

It has been shown that if the obligee does an act to the injury of the surety, or varies the terms of the contract, or enlarges the time of the performance, without the assent of the surety, the latter will be discharged.[4] A mere delay of the creditor to prosecute the principal will not impair the liability of the surety, unless such delay is in pursuance of a binding agreement and without the assent of the surety.[5] But where the creditor, though urged by the surety to prosecute and collect the money from the principal, refused to do so, and delayed until the principal became insolvent, such refusal was held a defense to the surety, either at law or in equity.[6] But this doctrine is believed to be a departure from the English law, and has been held with great strictness by the courts of New-York. Thus, in a later case,[7] the court held that this neglect of the creditor to sue for his debt, after being notified to do so by the surety, would not discharge the surety, if the principal was insolvent at the time such notice was given. And when the circuit judge charged, that the term solvent, in law, meant that "a man was able to pay all his debts from his own means, or that his property was in such a situation that *all his debts*

[1] Elwood v. Dieffendorff, 5 Barb. 398.

[2] Mathews v. Aiken, 1 Comst. 595.

[3] Clason v. Morris, 10 J. R. 524. Curtis v. Tyler, 9 Paige, 432. Heath v. Hand, 1 id. 329. La Grange v. Merrill, 3 Barb. Ch. R. 625. Ontario Bank v. Walker, 1 Hill, 652. Cheesborough v. Millard, 1 J. Ch. 409. Sandford v. McLean, 3 Paige, 117. Eddy v. Traver, 6 id. 521. Wilkes v. Harper, 2 Barb. Ch. 338.

[4] See ante, and cases.

[5] Sarly v. Elmore, 2 Paige, 497. Wagman v. Hoag, 14 Barb. 232.

[6] King v. Baldwin, 17 J. R. 384. Pain v. Packard, 13 id 174. The People v. Jansen, 7 id. 332.

[7] Herrick v. Borst, 4 Hill, 650

might be collected out of it by legal process," the charge was approved In another case. the court of errors held, that to discharge a surety on the ground of the omission of the creditor to proceed against the principal debtor when requested so to do, it must appear that the principal was *solvent* at the time of the request, *within the jurisdiction* of the state in which the suit against the surety is instituted, and that the creditor, without any reasonable excuse, neglected or refused to proceed, until the principal debtor became *insolvent* and unable to pay.[1] In delivering the opinion of the court of errors, which was unanimous, the chancellor said: "In Pain v. Packard, (13 J. R. 174,) the supreme court decided, that the surety was discharged when the principal debtor was perfectly responsible at the time the debt became due, and the creditor, although requested by the surety, refused to proceed and collect his debt, until the principal became insolvent. This decision was made without argument, and two at least of the judges who concurred therein, afterwards expressly dissented from it, and declared themselves satisfied it was wrong. It was also overruled by Chancellor Kent in King v. Baldwin, (2 J. Ch. R. 554,) and although Ch. J. Spencer afterwards succeeded in the court of errors (17 J. R. 386) in reversing the decree of the chancellor, it was in opposition to the votes of all the other justices of the supreme court who took part in the decision. The decision was made by the casting vote of the president, against the opinions of some of the most distinguished lawyers in the state, who were then members of the court as senators. It also stands in opposition to the decisions of most, if not all, of the states in the union, where the question has arisen. (Davis v. Huggins, 3 N. H. 231. Frye v. Barker, 4 Pick. 382. Buchanan v. Bordley, 4 Har. & McHen. 41. Croughton v. Duvall, 3 Call's R. 69. Moore v. Brousard, 20 Mart. R. 277. Lenox v. Prior, 3 Wheat. 524.) In Pennsylvania, where they have no court of chancery to enable the surety to proceed in his own name to compel payment by the creditor, it has, after much hesitation, been decided, that where the principal is solvent, the surety will be discharged if the creditor does not proceed and collect the debt on request, or prevent the surety to proceed in his own name. (Dehuff v. Turbit's Ex'r, 3 Yeates, 157. Cope v. Smith's Ex'rs, 8 Serg. & R. 110. Gardner, adm'r, v. Ferree, 15 id. 28.) In another case the supreme court refused to extend the principle of Pain v. Packard, and King v. Baldwin, to the case of a surety by covenant under seal, to pay rent in case the tenant made default. The court below overruled a plea, in an action on the covenant, which plea stated that the defendant requested

[1] Warner v. Beardsley, 8 Wend. 194.

the plaintiff to proceed and collect the rent then due by an immediate distress of the tenant's goods, and thereby relieve the surety, but that the plaintiff refused so to do, though he well knew that the circumstances of the tenant were becoming desperate, and that the rent could not be collected by any other process than by distress, and the supreme court affirmed the judgment.[1]

The doctrine of the cases of Pain v. Packard, and King v. Baldwin, are probably still to be followed in New-York, though they are not to be extended. That it is in conflict with the English cases, is very obvious.[2] In a late case the supreme court said, giving time or accepting a composition does not discharge the surety, if all remedies against the principal are reserved.[3]

It has been made a question, whether the recovery of a joint judgment at law against the principal and surety does not put an end to the relation of principal and surety, and thenceforth make them both principal debtors. This was so held by the late supreme court; and, consequently, after the recovery of the judgment, evidence was held inadmissible to show that one was surety, and that he was discharged, by any subsequent dealing with the principal.[4] On a subsequent trial it was held, in the present supreme court, that when a judgment is obtained on a demand against principal and surety, and a levy thereon is made, on the property of one of the debtors, which levy is relinquished on accepting, by the creditor, of a bond and mortgage against the principal debtor, and a receipt in full of the judgment is thereupon given, that it operates to discharge the surety.[5] This decision recognizes the rights of the surety *after*, as well as *before* judgment. And the same doctrine has been asserted by the chancellor and court of errors.[6] The case of La Farge v. Herter was brought a third time before the supreme court, when it was distinctly held, that in this state, equity recognizes and protects the relation and rights of a surety, *after* as well as *before* judgment. And the same rule extends to courts of law.[7] The right of subrogation, although originating in courts of equity, is now fully recognized as a legal right; and any act of the creditor which interferes with that right, and is a fraud upon it, operates to discharge the surety, as well at law as in equity. Of

[1] Ruggles v. Holden, 3 Wend. 216.

[2] Pitman on Prin. and Surety, 196. Brickwood v. Aniss, 5 Taunton, 614. Wright v. Simpson, 5 Ves. 734, and see dissenting opinion of Van Vechten, senator, in King v. Baldwin, 17 J. R. 397, where the cases are collected.

[3] Wagman v. Hoag, 14 Barb. 232.

[4] La Farge v. Herter, 3 Denio, 157.

[5] S. C., 4 Barb. 346.

[6] Bangs v. Strong, 10 Paige, 11; aff. on error, 7 Hill, 250.

[7] La Farge v. Herter, 11 Barb. 159

course, if such extension of time by the creditor be *with the knowledge and assent of the surety*, it takes the case out of the rule. These principles were all approved and affirmed on appeal by the court of appeals at the December term, 1853.[1] It follows that, in this state, the recovery of a joint judgment against principal and surety does not merge the suretiship of the surety, and render him a principal debtor. His rights will nevertheless be protected and enforced.

It has already been said if the creditor, by a *valid* agreement, gives time to the principal, the surety is discharged. In a late case in the court of appeals of New-York, it was said by Bronson, J., and Jewett, C. J., that an agreement to forbear the payment of the debt in consideration of a usurious premium paid for such forbearance is void, and therefore cannot operate to discharge the sureties.[2] But the decision of that point was not essential to uphold the decree under review, and the other six judges gave no opinion upon it.

An usurious agreement, though declared to be void, is not a nullity like an agreement brought about by actual fraud, or by a perjury. It falls under the class of constructive frauds, as being in contravention of public policy, and no one can avoid it except the party who is the victim of the usury, or one who stands in legal privity with him.[3] Such agreement to give time is a colorable obstruction to the surety's right, and should, on principle, operate to discharge him. Where it does not appear by the face of a promissory note, made by several makers, in what relation the parties stand to each other, it may be shown by parol evidence.[4] Adding the word "principal," or "surety," as the case may be, affords evidence of the relationship, and notice thereof to the whole world.[5] Prima facie, several sureties who sign the note of their principal, at different times, without communication with each other, are bound to contribute equally to the payment of the note, as between themselves. And consequently, when one of two sureties pays the whole, he may recover a moiety from his co-surety, in case the principal be insolvent.[6]

A party who is about to become surety upon a note already executed by the principal and other sureties, may regulate the terms of his suretiship to suit himself.[7] He may contract to be a co-surety with others who had executed the instrument, or to be as between him and

[1] See 4 Selden's Rep.

[2] Vilas v. Jones, 1 Comst. 274.

[3] Post v. Bank of Utica, 7 Hill, 391.

[4] Carpenter v. King, 9 Met. 515. Baker v. Briggs, 8 Pick. 122. Harris v. Brooks, 21 id. 195. Norton v. Coon, 3 Denio, 130; S. C., 2 Seld. 33, 39.

[5] Carpenter v. King, supra.

[6] Norton v Cook, 2 Seld. 33.

[7] Id. 39.

them, surety alone, not co-surety with them, and thus exempt himself from liability to contribute.[1] But such special contract, varying the ordinary relationship of surety, cannot be proved by parol. The reason for this distinction is thus stated by Gray, J., in Norton v. Coons, already cited: "As between the makers of the note and the payee, their rights and liabilities are regulated by the terms of the contract as expressed; as between the sureties, the contract is implied from their signatures to the note, so that the whole contract as expressed and implied is, in short, an agreement by the several obligors to pay the note at maturity, and if, upon default of its being paid, either of the sureties pay it, the others shall contribute, each his equal proportion of the amount paid, less the share of the one who has paid the whole. In the one case, the parties have defined their liabilities in express terms; in the other, the law has defined them, and in terms equally express; and thus settles, as between the sureties, the legal effect of subscribing their names to the note. They are each chargeable with knowledge of the legal liability incurred as between themselves by the execution of the note, and should therefore be regarded as standing in the same relation to each other, and bound by the same rule they would be if the legal effect of their contract had been fully written above their signature."

The learned judge, however, admits that parol evidence of extrinsic facts is admissible to rebut the presumption arising from the face of the instrument, that all are principals and equally bound to contribute. But "he denies that you can go further, and show by parol, not by extrinsic facts, an agreement varying the operation of the contract as defined by law and subscribed to by him, and thus in effect made his written agreement. The law having defined the rights and obligations of the sureties as between themselves, their signatures establish their assent to it, and the contract is thus made as clear and certain as if the whole had been written. It is the highest and best evidence of their agreement, and the reason of the rule that excludes parol evidence from being received to vary the operation of a contract, wholly written by the parties, applies with all its force to this case."

The doctrine of contribution has been extended to a great variety of cases. *Qui sentit commodum sentire debet et onus*;[2] *he who derives the advantage ought to sustain the burden*, is a maxim of equity founded

[1] Harris v. Warner, 13 Wend. 400. Norton v. Coon, 2 Seld. 39. Pitman on Prin. and Surety, 148, 9.

[2] 2 Inst. 489. Broom's Maxims, 553.

in wisdom and good sense. The doctrine is not so much founded on contract, as on the principles of equity and justice, that where the interest is common, the burden also should be common; and this principle that equality of right requires equality of burden, has a more effectual operation in a court of equity than in a court of law. Chancellor Kent applied the doctrine to the case where there was an old party wall between two owners of houses, in the city of New-York, and one of them being desirous to build a new house on his lot, pulled down the old house, and with it the party wall, which was ruinous, and rebuilt it with his new house. The chancellor held, that the owner of the adjoining house and lot was bound to contribute ratably to the expense of the new wall of partition.[1] It was conceded, in that case, that the adjoining owner was not bound to contribute to building the new wall higher than the old, nor, if materials more costly, or of a different nature were used, was he bound to pay any part of the extra expense.[2]

In his opinion, in that case, the chancellor says: "In the case before me, the parties had equality of right and interest in the party wall, and it became absolutely necessary to have it rebuilt. It was for the equal benefit of the owners of both houses, and the plaintiff ought not to be left to bear the whole burden." The inconvenience of the repair was inevitable, and as small and as temporary as the nature of the case admitted. There is more difficulty in enforcing contribution at law than in equity. Contribution depends rather upon principles of equity, than upon contract. "The obligation arises not from the agreement, but from the nature of the relation, or *quasi ex contractu;* and as far as courts of law have, in modern times, assumed jurisdiction upon this subject, it is, as Lord Eldon said, upon the ground of an implied assumpsit."[3] Lord Eldon in the same case said, that the modern jurisdiction of the courts of law was attended with difficulties, when the sureties were numerous; and especially, since it has been held that separate actions may be brought against different sureties, for their respective proportions.

The statute in relation to division fences, between the owners of adjoining lands, is based upon the doctrine that where there is an equality of benefit, there should be an equality of burden.[4] At common law, the tenant of a close was not bound to fence against an adjoining close, unless by prescription; and if bound by prescription to fence his close, he was not bound to fence against any cattle but such as were rightfully in the

[1] Campbell v. Messier, 4 J. Ch. R. 334.
[2] Id.
[3] Craythorne v. Swinburne, 14 Ves. 164.
[4] 1 R. S. 353, part 1, ch. 9, tit. 4, art. 4.

adjoining close. If not bound at common law to fence his land, he was nevertheless bound at his peril, to keep his cattle on his own ground, and prevent them from escaping.[1]

In the ordinary case of a turnpike running through the lands of an individual, neither the turnpike company or the public has any interest in protecting such road against encroachments of cattle or other animals from the adjacent lands, as such encroachments will not materially affect the ordinary use of the road. And neither law or equity will compel the turnpike company to maintain fences, from which it is to derive no benefit. The case is otherwise with respect to a railroad company, which has a deep interest in securing their road against the encroachments of cattle, sheep and swine from the adjacent lands. If the owners of the adjacent lands elect to let their lands lie open to commons, the railroad company will of necessity be compelled to make the whole of the partition fence, to secure itself against encroachments from cattle. If such owner finds it necessary to have his land enclosed, either for the purpose of cultivation, or to restrain his own cattle, he will have an equitable claim upon the railroad company to make and support one half of the partition fence. Although the case does not come within the letter of the statute, (1 R. S. 353, § 30.) it comes clearly within the equitable principle adopted by the legislature; that when the owners of adjoining lands are to receive a common benefit from a division fence between them, each shall contribute a moiety towards the erection and support of such fence, so long as the common benefit continues. In this case, says Chancellor Walworth, equity will compel the railroad company and the adjoining land owner to contribute equally towards the erection and maintenance of the partition fence. And if either shall neglect or refuse to make or repair his or their proportion of such fence, after reasonable notice, the other may make the whole, and recover the contributory share of the one so neglecting or refusing, in the equitable action of assumpsit.[2]

This principle of equitable contribution between the owners of adjoining lands is not new; neither does it depend for its support upon express statutory provision. It was originally derived from the civil law, and is

[1] 3 Kent's Com. 438. Rust v. Low, 6 Mass. 90. Hollady v. Marsh, 3 Wend. 142. Per Walworth, Ch. in Clark v. Brown, 18 Wend. 221. Bush v. Brainard, 1 Cowen, 78, 79, and note. Little v. Lathrop, 5 Greenl. 356. Stackpole v Healy, 16 Mass. 33.

[2] In matter of R. and S. Railroad, 4 Paige, 554, 555.

constantly acted upon in those countries where the equitable principles of the civil law regulate the rights of vicinage.[1]

In New-York, the general railroad act of 1850 has cast the burden of erecting and maintaining the fences, on the sides of their roads, upon the respective companies, and has prescribed the height and strength of such fence.[2] In most of the states, it is presumed, there are statutory regulations with respect to division fences, which supersede, in a great measure, a resort to a court of equity for relief.

The provisions of the New-York revised statutes, (1 vol. 353,) are made more particularly with reference to lands occupied for farm purposes in the country. They are inapplicable to the division fences and walls between adjoining lots in cities and villages, except so far as they establish the equitable principle, that equality of benefit should be accompanied with equality of burden. Hence, in most large cities and towns, there are special regulations, by which the rights and remedies of the owners of urban property are guarded.[3] It is presumed, that in the absence of special laws on the subject, the equitable rule, requiring each party to bear his just proportion of a common burden, would be enforced in towns and villages where the settlements are compact.

The doctrine of contribution has been applied to charges created upon land divided into lots. Thus, where six separate lots were mortgaged, and the mortgagee, afterwards, released four of the lots from the mortgage, leaving the original debt to stand charged on the remaining two, it was held that the two lots were chargeable with their ratable proportion only of the original debt and interest, according to the relative value of the six lots at the date of the mortgage. When land is charged with a burden, each part ought to bear its due proportion of the charge; and equity will compel each part to a just contribution.[4] And the creditor cannot, by any act or assignment of his, deprive the co-creditors or owners of the land of their right of contribution against each other.[5] The court will compel the creditor to aid the contribution, by assigning his bonds and securities to the debtor or surety, or owner of the land whom he charges with the whole demand, and he will not be permitted, voluntarily, to defeat this right.[6]

[1] In matter of R. and S. Railroad, 4 Paige, 556. Code Nap. art. 653 to 670. Bell's Law of Scotland, 279, art. 1086.

[2] Act of 1850, p. 233, § 44.

[3] 3 Kent's Com. 438, et seq. and notes.

[4] Stevens v. Cooper, 1 J. Ch. R. 425.

[5] Id.

[6] Millard v. Cheesborough, 1 J. Ch. R 409.

If a man be seised of three acres of land, and is bound by a judgment, or recognizance, &c., and aliens one acre to A., another to B., and the third descends to his heir; in this case, if the execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and sits in the seat of his ancestor. But if the alienation be to two or more standing in *equali jure* and one is compelled to pay, he shall have contribution. The same rule applies to parceners, who make partition. If one has to pay the whole charge, she shall have contribution against her companions.[1]

The rule in this state, with respect to successive purchasers of parts of land *mortgaged*, is different. Thus, Chancellor Walworth in one case said, where lands belonging to several persons are covered by a mortgage given by the person from whom they all derive title, the lands last sold by him are first liable to satisfy the incumbrance; and the several parcels must be sold by the master in the inverse order of their alienation. When the purchase money has been paid in good faith, the first purchaser has the prior equity, although the consideration was not actually paid until after other portions of the land had been purchased and paid for by the vendee.[2]

The ground of the distinction is that a mortgage is a specific lien, and is analogous to a rent charge issuing out of the land, whereas a judgment is the personal obligation of the debtor, and the charge on the land is only by way of security. Hence, it seems, that there is no contribution between purchasers in succession, at different times, of different parts of the estate of a *judgment* debtor.[3] Whenever the judgment creditor disposes of a part of the land held by the judgment, the purchaser has an equitable right to have the judgment discharged out of the residue of the property. Although a subsequent purchaser has an equal equity to have the land which he has purchased and paid for discharged from the lien of the judgment, as against the debtor, the first purchaser, having the prior equity, must be preferred. Where the equities are equal, and neither has the legal right, the maxim, *qui prior est in tempore potior est in jure*, prevails.[4]

As the object of insurance is to indemnify the insured, it follows that, in the case of double insurance, if one underwriter pays the entire loss, he is entitled to contribution from the other underwriters. The insured

[1] Herbert's case, 3 Co. 12.

[2] Gouveneur v. Lynch, 2 Paige, 300.

[3] Clows v. Dickinson, 5 J. Ch. R. 235. Gill v. Lyon, 1 id. 447.

[4] James v. Hubbard, 1 Paige, 228, 234

in such case, though entitled to but one satisfaction, may recover the whole amount of his loss against either of the underwriters, and leave the latter to recover a ratable satisfaction from the other insurers. Where a policy of insurance contains a clause, that "in case of any other insurance upon the property insured, whether prior or subsequent to the date of the policy, the insured should not, in case of loss or damage, be entitled to demand or recover on the policy any greater portion of the loss or damage sustained, than the amount insured shall bear to the whole amount insured on said property," the defendant is not entitled to contribution against other underwriters who have signed a similar policy. In such case each is bound to pay his proportionate share of the loss, which will be adjusted when the verdict is given.[2] But if one policy contain this clause, and two others do not, and the latter have paid a sum equal to the whole loss, this will be a defense to the action on the policy containing this clause, the underwriter of which is liable to contribute to the underwriters who have paid.[3]

In case of a fire policy for $20,000, on a stock of goods worth $35,000, a fire broke out which endangered the goods, to save which, and the building in which they were contained, some blankets were procured by the insured to hang on the side of the building, which, in that situation being constantly kept wet, served to check the fire, and contributed materially to save the building and its contents. The blankets being injured in this manner so as to be of no value, the assured claimed the whole value of them against the underwriters, who were, by the terms of the policy, liable for the whole damage to the goods by fire, not exceeding the amount insured.

On the part of the underwriters, it was contended, that as the blankets were used and destroyed to save the building as well as all the goods, the several parties interested were liable proportionally for this damage; that is, the underwriters, on the $20,000 insured; the assured on $15,000, not covered by the policy, and on $5,000, the value of his lease of the building; and the owner of the building on $5000, the value of the building over that of the lease; making the underwriters liable for four ninths of the damage to the blankets.

The court said, that the assured could claim only on the ground of a sacrifice made for the preservation of the property, for a proportion of which they are equitably, if not legally, entitled to recover. They ad-

[2] Lucas v. Jefferson Ins. Co., 6 Cowen, 637. Murdock v. Chenango Co. Mut. Ins. Co 2 Comst. 210.

[3] Id. 635.

[3] Lucas v. Jefferson Ins. Co. 6 Cowen. 635.

mit that in general, on fire policies, it was customary to pay the whole loss. But as the claim for destroying the blankets was not within the contract, it was reasonable that the assured should bear a proportion of the sacrifice made for the common benefit. And they accordingly held that the loss should be borne in proportion to the amount which the parties had at risk.[1] In this case, the relief was granted in an action at law; but it is obvious that equity will, in general, afford a more comprehensive remedy and embrace all the parties in a single action, which was not done in the case in Pickering.

The doctrine of average gives rise to a variety of questions, which are ill suited to an action at law; but which can be more conveniently settled in a court of equity. Thus, expenses incurred, sacrifices made, or damages sustained for the common benefit of ship, freight and cargo, constitute *general* or *gross* average. A loss which is not incurred for the general benefit is a *particular* average, or *total loss*.[2]

In order to constitute a basis for a contribution for an expense or sacrifice, it must be occasioned by an apparently imminent peril. The goods must not be swept away, by the violence of the waves, for then the loss falls upon the merchant or his insurer, but they must be *intentionally* sacrificed, by the mind and agency of man, for the safety of the ship and the residue of the cargo.[3]

Damage to vessels by collision with each other, whether with or without fault, or by fault of both vessels, *not being an intentional* sacrifice, is not a subject of general average by the laws of England or the United States.[4]

A jettison is the throwing overboard of a part of the cargo, or any article on board of a ship, or the cutting and casting away of mast, spars, rigging, sails, or other furniture, for the purpose of lightening or relieving the ship in case of necessity or emergency. A jettison is only permitted in case of extreme severity, as where the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies; and then, if the ship and residue of the cargo be saved by means of the sacrifice, nothing can be more reasonable, than that the property saved should bear its proportion of the loss.[5] Where it becomes necessary for the general safety to make

[1] Welles v. Boston Ins. Co. 6 Pick. 182.
[2] 2 Phil. on Ins. 64.
[3] 3 Kent's Com. 233.
[4] 2 Phil. on Ins. 66.
[5] 3 Kent's Com. 233. 2 Phil. Ins. 68, 69.

a jettison, or other sacrifice of a part of the interests at risk, the loss must be made good by contribution to be assessed upon what is saved of ship, cargo and freight.

Before contribution takes place, it must appear that the goods sacrificed were the price of safety to the rest; and if the ship be lost, not withstanding the jettison, there will be ground for contribution.[1]

In this country, the terms *partial loss* and *average* are understood by commercial men, to mean the same thing; and *average, other than general*, includes every loss for which the underwriter is liable, except general average and total loss, which last includes total loss with salvage. Partial loss, includes both general and particular average, and the latter term includes all partial losses, except general average.[2]

The principle of this general contribution is known to be derived from the ancient law of Rhodes, being adopted into the Digest of Justinian, with an express recognition of its true origin. The rule of the Rhodian law is this: "If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all, shall be made good by the contribution of all."[3] The circumstances under which they may be thrown overboard have already been stated. The principle has been confined to a sacrifice of property, and the contribution, to the property saved thereby.[4] A full discussion of the law of average belongs more appropriately to a treatise on insurance, or on the law relative to merchants' ships and shipping, and the law on the subject will be found in books devoted to those subjects. The present object is to show, how difficult it often is to apportion and adjust losses of this nature in an action at law. By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board, are to contribute to the reimbursement for the loss, according to their relative values. The value of the property sacrificed for the common preservation must first be ascertained, and then the value of the several interests which are to contribute to the loss. If the property sacrificed were owned by one man, and the property saved by another, the rights could be adjusted with reasonable facility in a single action at law. But it will generally happen, that the property sacrificed for the common good is owned by different individuals, and that saved belongs to different and perhaps hostile interests. In such cases it will be found impracticable

[1] 3 Kent's Com. 235. Crocket v. Dodge, 3 Fairf. 190.

[2] Per Walworth, Ch. in Wadsworth v. Pacific Ins. Co. 4 Wend. 39.

[3] Abbott on Ship. 574, 575, Story & Perkins' ed.

[4] Story's Eq. Jur. § 490.

to adjust the whole matter, in a single action at law, in such manner as to bind all the parties, and to apportion the loss among each according to the principles applicable to the case. A court of equity affords facilities for such apportionments, which will be sought in vain in the ordinary proceedings of a common law action.[1]

The law of lien often gives rise to matters of account, and for this cause, as well as for the reason that it prevents a multiplicity of actions, equity entertains jurisdiction. A lien is a right to possess and retain property until some charge attaching to it is paid or discharged. It is not, in strictness, either a *jus in re* or a *jus ad rem;* that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.[2] At common law there can be no lien without possession.[3] And a party having a lien upon goods looses it when he voluntarily parts with the possession.[4] In maratime law, liens exist independently of possession, either actual or constructive. In courts of equity, the term lien is used as synonymous with a charge or incumbrance.[5] Thus judgments of courts of record, which by statute "bind and are a charge" upon the lands of the debtor from the time of docketing,[6] are said, in equity, to be a lien upon such lands. And an execution against goods and chattels, which by statute "bind" the same from the delivery thereof to the proper officer to be executed, are treated in equity as liens upon the said property from the said time.[7]

When property is found derelict at sea, or elsewhere, within the limits of admiralty and maritime jurisdiction, the salvor, by whose services, personal risk and exposure it is saved, has a right to hold it until paid his reasonable salvage; and when taken from him wrongfully, even by the general owner, he has a right to bring replevin in a common law court, without resorting to admiralty.[8] The question whether personal risk is incurred, in saving the property, does not affect the right of the salvor, but only the amount of his compensation. These principles were applied by the New-York court of appeals, in the case of the loss of a quantity of wool, on board of a canal boat, which was occasioned by the sinking of

[1] Hallett v. Bourfield, 18 Ves. 187.

[2] Story's Eq. Jur. § 506. Burrell's Law Dict. tit. Lien.

[3] Hammond v. Barclay, 2 East. 235. Peck v. Jenness, 7 How. 620.

[4] McFarland v. Wheeler, 26 Wend. 467.

[5] Peck v. Jenness, per Grier, J. 7 How 620.

[6] 2 R. S. 359, § 3.

[7] Id. 365.

[8] Baker v. Hoag, 3 Seld. 555.

the canal boat, on the Hudson river, where the tide ebbs and flows, by a collision with a steamboat. The plaintiff, by whose exertions, expense and personal risk the property was recovered, was held to have a lien thereon for his reasonable salvage.[1] Had this property belonged to different owners, it is obvious that a court of law could not have apportioned the salvage among the parties in interest, as conveniently as a court of equity.

Factors and agents have a lien on property intrusted to them until some demand of theirs be satisfied. This lien is created either by common law, or by the usage of trade, or by the express agreement, or particular usage of the parties. The convenience of commerce and natural justice are on the side of liens.[2] A lien, said Tindal, Ch. J.,[3] can only arise in one of three ways; either by express contract; by a general course of dealing in the trade in which the lien is set up; or from the particular circumstances of the dealing between the parties.

A lien is often sustained in equity when it is unknown in law, as in the sale of land, where a lien exists for the unpaid purchase money.[4] It is superior to the lien of a prior judgment against the vendee.[5] It exists against subsequent purchasers and incumbrancers, when they advance no new consideration, or have notice.[6] A person having an equitable lien upon land for the unpaid purchase money, may come into a court of equity in the first instance to enforce such lien; without resorting to a suit at law to recover the amount.[7] Thus if, upon the sale of a farm, the purchaser should pay for the half of it in good money, and the other half in the worthless bills of a broken and insolvent bank, from which nothing could be obtained, the vendee fraudulently representing such bills to be good and collectible, the vendor would have the right to elect, either to rescind the sale and have a reconveyance of the land, or to charge the land itself with the half of the purchase money which remained unpaid, as an equitable lien upon such land.[8] A lien is not confined to mere labor and services on the specific property, or connected therewith, but is often, by the usages of trade, extended to cases of a general balance of

[1] Baker v. Hoag, 3 Seld. 555.

[2] Per Lord Mansfield, in Green v. Farmer, 4 Burr. 2221

[3] Ferguson v. Norman, 5 Bing. N. C. 76.

[4] Garson v. Green, 1 J. Ch. R. 308. Clark v. Hull, 7 Paige, 382.

[5] Arnold v. Patrick, 6 Paige, 310.

[6] Hallock v. Smith, 3 Barb. S. C. R 267.

[7] Bradley v. Bosley, 1 Barb. Ch. R. 152.

[8] Id. per Walworth, Ch. 1 Barb. Ch. R. 152.

account in favor of factors and others.[1] The mere relation of principal and factor does not confine the rights of the latter to recover for advances, to the mere fund deposited; but such advances are made on the joint credit of the fund and the person; to which this qualification may be added, that, from the nature of the contract, resort must first be had to the fund, if it can be made available, before the principal is liable.[2]

In most of the cases which have been put, the adjustment of the lien leads to matters of account; and often, from the complicated nature of the transaction, and the multiplicity of parties, a resort to equity is rendered indispensable. The subject of lien will recur under other heads, where it will be viewed in other aspects.

The question sometimes arises, as to the party by whom the interest on mortgages or other incumbrances should be paid. The estate may be held by a tenant for life, subject to an incumbrance, and the question whether he is bound to pay any, and if so, what portion of the principal, or any portion of the interest, may be important to be known. In England, the general rule seems to be, that the tenant for life of an equity of redemption is bound to keep down and pay the interest, but he is under no obligation to pay off the principal.[3]

The distinction in the English books between the payment of an incumbrance by tenant in tail, and tenant for life, is of no practical use with us, since estates in tail are converted into estates in fee. The payment of an incumbrance by tenant in tail was treated like a payment by the owner of the fee, because, by fine or recovery, he could become the absolute owner of the estate. Being in possession, his payment would extinguish the incumbrance. It is otherwise with respect to tenant for life. His paying off an incumbrance would make him a creditor to the amount paid, upon the ground that with his limited interest there can be no presumption, that he could intend to exonerate the estate.[4]

It is the duty of the tenant for life to pay the ordinary taxes, out of the rents and profits of the estate, but it seems that assessments going to the permanent benefit of the inheritance must be apportioned.[5] The former rule in England, with respect to the discharge of incumbrances, between the tenant for life and the remainderman or reversioner, was to require the tenant for life to pay one third, and the remainderman or re-

[1] Paley on Agency, by Dunlap, ch. 2, § 3, p. 127.

[2] Corlies v. Cumming, 6 Cowen, 184, per Woodworth, J. Burrell v. Philips, 1 Gal. 360. Deish v. Dickson, 1 Mason, 9.

[3] Saville v. Saville, 2 Atk. 463, 464. Shrewsbery v. Shrewsbery, 1 Ves. jr. 233.

[4] Id.

[5] Cairnes v. Chabert, 3 Ed. Ch. R. 312.

versioner the other two thirds.[1] But the rule is now entirely exploded in England, and a far more reasonable one adopted. It is this: that the tenant shall contribute, beyond the interest, in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life, (which of course will de pend much upon his age, and the computation of the value of his life;) and it will be referred to a master, to ascertain and report what proportion of the capital sum due the tenant for life, ought, upon this basis, to pay, and what ought to be borne by the remainderman, or reversioner.[2] If the estate is sold to discharge incumbrances, (as the incumbrancers may insist that it shall be,) in such a case, the surplus beyond what is necessary to discharge the incumbrances is to be applied as follows: the income thereof is to go to the tenant for life, during his life; and then the whole capital is to be paid over to the remainderman, or reversioner.[3]

These principles are applicable in actions for the partition of lands, wherever the estate of a tenant in dower, or by the curtesy, or for life to the whole or any part or share of the premises in question exists, and the person entitled to such estate is made a party. In such case the court is to consider first whether such estate ought to be excepted from such sale, or whether the same should be sold. If a sale of the premises including such estate be ordered, the estate and interest of every such tenant or person is declared to pass thereby; and the purchaser holds the premises free and discharged from all claims by virtue of any such estate or interest, whether the same be to any undivided share of a joint tenant, or tenant in common, or to the whole or any part of the premises sold. Upon such sale being made of any such interest or estate, the court directs the payment of such sum in gross, out of the proceeds thereof, to the person entitled to such estate in dower, tenancy by the curtesy, or tenancy for life, as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved.[4] A similar rule exists for satisfying the tenant in dower, where the estate of a deceased person is sold by order of the surrogate for the payment of debts.[5]

[1] Powell on Mortgages, ch. 11, p. 311. Shrewsbery v. Shrewsbery, 1 Ves. jr. 233. Faulkner v. Daniel, 3 Hare, 199, 217.

[2] Story's Eq. § 487. Powell on Mortg. ch. 11, pp. 311, 312. Mr. Coventry, note M. White v. White, 4 Ves. jr. 33. 9 id. 554. Perkuyn v. Hughs, 5 id. 107. Alan v. Backhouse, 2 Ves. & Beame, 65, 70, 79.

[3] See same cases, and Lloyd v. Johnes, 9 Ves. 37.

[4] 2 R. S. 325, §§ 50, 51, 52. Harwood v. Kirby, 1 Paige, 469.

[5] 2 R. S. 106, § 36.

Questions of this nature can, in general, be better adjusted in a court of equity than at law. Their application will be seen, when we come to consider the subject of partition and dower.

APPORTIONMENT forms another head of equity jurisdiction, referable to the action of account. Lord Coke says, this cometh of the word *portio, quasi partio,* which signifieth a part of the whole, and *apportion* signifieth a division, or partition of a rent, common, &c., or a making of it into parts.[1]

There are several points to be noticed in relation to the apportionment of rents.

There are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent arises; the other, by granting part of the rent to one person, and part to another.[2]

It was a principle of the common law, that an entire contract could not be apportioned. The convenience of mankind dictated the necessity of an apportionment of rent, in a variety of cases. It may sometimes be apportioned by the act of the parties, and sometimes by the act of the law.[3] Thus, where the grantee of a rent-charge releases part of the rent to the tenant, such release will not extinguish the whole rent, but the part not released will still continue.[4]

As a rent service is something given by way of retribution to the lessor, for the use and occupation of the land demised, the lessor's title to the rent is founded on the principle, that the land demised is enjoyed by the tenant. If, therefore, the tenant be by any means deprived of the land demised, the obligation to pay the rent ceases. If the tenant be evicted from the lands demised to him, he will thereby be discharged from payment of the rent.[5] The tenant is liable in such cases to the payment of rent which *became due before the eviction,* because the obligation continues as long as the consideration. But if the tenant be evicted by a title paramount, before the day appointed for the payment, such eviction will discharge the tenant from the payment of any part of it.[6]

The rules on the subject of eviction were thus stated by Spencer, senator,

[1] Co. Litt. 147, b.

[2] Bliss v. Collier, by Abbott, Ch. J., 5 Barn. & Ald. 876.

[3] Cruise's Dig. tit. Rent, ch. 3, § 22.

[4] Id.

[5] Cruise's Dig. tit. Rent, ch. 3, § 1. Bordman v. Osborn, 23 Pick. 299.

[6] Cruise's Dig. Rent, ch. 3, § 2.

in the court of errors of New-York:[1] "The lessor is not entitled to recover rent in the following cases: 1st, If the lands demised be recovered by a third person, by a superior title, the tenant is discharged from the payment of rent *after* eviction by such recovery: 2d, If a part only of the lands be recovered by a third person, such eviction is a discharge only of so much of the rent as is in proportion to the value of the land evicted: 3d, If the lessor expel the tenant from the premises, the rent ceases: 4th, If the lessor expel the tenant from a *part* only of the premises, the tenant is discharged from the payment of the *whole* rent; and the reason for the rule, why there shall be no apportionment of the rent in this case, as well as in that of an eviction by a stranger, is, that it is the wrongful act of the lessor himself, that no man may be encouraged to injure or disturb his tenant in his possession, whom, by the policy of the feudal law, he ought to protect and defend." In the case just cited, it was held, by the court of errors, that where the lessor was guilty of bringing lewd women under the same roof with the demised premises, though in an apartment not demised, by which nocturnal noise and disturbance were made; and, in consequence, the lessee quitted the premises and remained away with his family, it was held that this was evidence to go to the jury under a plea of eviction by the landlord, in answer to a declaration for the rent; and that the jury might, upon such evidence, find the plea true; and that the lessor would thereby be barred of his rent, the same as on an actual or physical entry and expulsion of the tenant.[2]

It is said, in Bacon's Abridgment, that there are a variety of opinions whether, when the lessor enters *wrongfully* into a part of the demised premises, the entire rent shall not be suspended during the continuance of such tortious entry; and it is there said to be the better opinion, and the settled law at this day, that in such case the tenant is discharged from the payment of the *whole* rent, till he be restored to the *whole* possession.[3]

And when the books speak of an apportionment, in case when the lessor enters upon the lessee in part, they are to be understood when the lessor enters *lawfully*, as upon a surrender, forfeiture, or the like. Thus, if a man be seised of two acres, one in fee and another in tail, and makes a lease for life or for years of both acres, and dieth, and the issue in tail avoideth the lease, the rent shall be apportioned.[4]

When the action to recover rent is founded on the privity of estate,

[1] Dyett v. Pendleton, 8 Cowen, 728.

[2] Ogilvie v. Hull, 5 Hill, 52, 54. Gilmooley v. Washington, 4 Comst. 217.

[3] Bacon's Abr. tit. Rent, M.

[4] Id. Co. Litt. 148, b.

the eviction of the tenant by a paramount title, from a part of the demised premises, may be set up by him as a defense *pro tanto*. In such cases the rent is apportioned.[1] And when apportioned, it is to be done according to the value of the land.[2] If there be no evidence of the value of the land, the rent may be apportioned according to the quantity of land held by the tenant. Prima facie, it was said, all the land was of equal value. The defendant might have so pleaded as to require the apportionment to be made according to value.[3]

Although a tenant cannot deny the right of his landlord to demise, nor can he set up an outstanding title against him, he may become the purchaser of the reversion, at a sheriff's sale, on an execution against the landlord, or he may acquire the interest of his landlord in the reversion as a redeeming creditor, when the reversion has been sold on an execution against the landlord. If the interest of the landlord, thus acquired by the tenant, extends to the whole of the demised premises, he may set it up in bar of the recovery of the rent; but when it includes only a *part* of the demised premises, it operates only in diminution of damages. The tenant, in the latter case, may demand an apportionment.[4] So where a person who has a rent service, purchases part of the land out of which the rent issues, the whole of the rent service is not thereby discharged, but only a part, *proportioned* to the quantity of the land purchased.[5] So, also, a person who has a rent service may release a part of it, which will not determine the whole rent, but only the part released.[6]

The assignee of the reversion of *part* of the demised premises may maintain covenant against the lessee for not repairing.[7] A reversioner may sell his estate in parts to different persons, each of whom will be entitled to a separate portion of the rent; or if the reversioner die, leaving several children, his estate will descend to them by operation of law, and each will be entitled to his share.[8]

If a moiety of a reversion be extended by an elegit, the rent shall be apportioned, and the lessor shall still enjoy half the rent as incident to the reversion that remains in him.[9] A rent service at common law, is apportioned either on severance of the land from which it issues, or of the reversion to which it is incident. If it be in its nature indivisible,

[1] Stevenson v. Lambard, 2 East, 575. Lansing v. Van Alstyne, 2 Wend. 561.

[2] Bac. Abr. tit. Rent, M.

[3] Van Rensselaer v. Jones, 2 Barb. S. C. R. 653.

[4] Nellis v. Lathrop, 22 Wend. 121.

[5] Cruise's Dig. tit. Rent, ch. 3, § 5.

[6] Cruise's Dig. tit. Rent, ch. 3, § 6. Bac. Abr. tit. Rent, M.

[7] Twyman v. Pickard, 2 Barn. & Ald. 105.

[8] Bank of Penn. v. Wise, 3 Watts, 394.

[9] Bac. Abr. Rent, M.

as one day's service, and the lessee assigns a part of the premises, the service multiplies.[1] Rent is apportioned among assignees according to the value of their portions, and not the number of acres held by them respectively.[2] And if there be no proof of value, the apportionment will be according to the quantities.[3]

The doctrine of the common law, that an entire contract could not be apportioned, was limited to personal contracts, and did not extend to such as run with the land.[4] Even in the latter cases, equity did not apportion rent as to time. Thus, where tenant for life, leased for term of years, rendering rent half yearly, and died in the middle of the half year, equity could not apportion the rent.[5] Upon this occasion, Lord Chancellor Cowper said: "There are several remedial statutes relating to rents, but this is *casus omissus;* the *law* does not apportion rent in point of time, and I do not know that equity ever did it. This is an accident which the judgment creditor might have guarded against by reserving the rent weekly; so that it is his fault, and becomes a gift in law to the tenant." The statute of 11 G. 2, ch. 19, § 15, has in certain cases altered the law as to the apportioning of rents in point of time. The substance of this statute has been adopted in New-York, where it is enacted, that every person entitled to any rents, dependent upon the life of any other, may, notwithstanding the death of such other person, have the same remedy for the recovery of all arrears of such rent, that shall be behind and unpaid at the death of such other person, as he might have had if such person was in full life. The statute also gives the same remedy to the executors or administrators of the landlord that their testator or intestate might have had, if living. It provides further, that where a tenant for life, who shall have demised any lands, shall die, on or after the day when any rent becomes due and payable, his executors or administrators may recover from the under tenant the whole rent due; if he die before the day when any rent is to become due, they may recover the proportion of rent which accrued before his death.[6] The statute of 4 William 4, ch. 22, in amendment of the act of 11 Geo. 2, declared that all rents service, rents charge, and other rents, annuities, dividends, *and all other payments, made payable at fixed periods,* should be apportioned, and it

[1] Van Rensselaer v. Bradly, 3 Denio, 135.

[2] Van Rensselaer v. Gallup, 5 Denio, 454.

[3] Van Rensselaer v. Jones, 2 Barb. S. C. R. 643.

[4] Van Rensselaer v. Bradly, 3 Denio, 141, per Jewett, J.

[5] Jenner v. Morgan, 1 P. Wms. 392.

[6] 1 R. S. 747, §§ 20, 21, 22.

provided for the recovery of the apportioned parts from the last period of payment. This latter statute has not been adopted in this state.

Annuities and servants' wages, like rents, were not in general apportionable at common law, and the rule seemed to be applicable to all periodical payments becoming due at fixed intervals. Thus, when the plaintiff's testator was appointed bailiff to receive rents, under a promise of £100 per annum for his services, and having performed the service for three quarters of a year, he died. An action was brought by his executors to recover £75 for the three quarters of a year. But the court held that the time could not be divided, and that without a full service for the year there could be no recovery.[1] The case was decided upon the analogy to the law, which did not allow an apportionment of rent as to time. But this rule has been relaxed in modern times, and wages, it is understood, may be apportioned upon the principle that such is the reasonable construction of the contract of hiring.[2] But this is only when there is no express contract for a particular time; for, in the latter case, the contract being entire, performance is a condition precedent to a right of recovery.[3]

Although annuities are not, in general, apportionable, yet if the annuitant dies within the year or quarter, as the case may be, and the annuity was given for maintenance, in infancy, or for the separate maintenance of a feme covert, equity will apportion the annuity up to the day of the annuitant's death, on the principle that the allowance was necessary, and on the presumed intention of the parties.[4]

The right of common sometimes requires the application of the doctrine of apportionment. Common is a right or privilege, which one or more persons have, to take or use some part or portion of that which another person's lands, waters, woods, &c., produce. The most general and valuable kind of common is common of pasture, which is a right of feeding one's beasts on another's land. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.[5] Common appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor, and can only be claimed by prescription.[6] Common appurtenant does not arise from any

[1] Countess of Plymouth v. Throgmorton, 1 Salk. 65.

[2] Per Lawrence, J. in Cutler v. Powell, 6 D. & E. 326; but see 2 Leigh's N. P. 86, 87 and 88, and the cases cited.

[3] Reab v. Moore, 19 J. R. 337.

[4] Hay v. Palmer, 2 P. Wms. 501. Shepherd v. Wilson, 4 Hare's R. 395.

[5] Cruise's Dig. tit. 23, Com. §§ 1, 2, 3.

[6] Id. §§ 3, 4. Watts v. Coffin, 11 J. R. 498, per Van Ness, J.

connection of tenure, but must be claimed by grant or prescription, and may be annexed to lands lying in different manors from those in which it is claimed. This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be *created by grant*, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land. It may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. It may be for cattle without number, or for a certain number only.

Common *by cause of vicinage* is in fact only *a permissive right*, intended to excuse what in strictness is a trespass. It can only exist between two townships or manors adjoining one another; not where there is intermediate land.

Common *in gross* is a right which must be claimed by deed or prescription, and has no relation to land, but is annexed to a man's person. This may be either for a certain or an indefinite number of cattle. The full consideration of this subject belongs to a treatise on real property. The above is enough for the present purpose.[1]

Common of pasture when it is *appendant*, may be apportioned; because it is of common right. In the case of common *appurtenant*, if the person entitled to it purchases part of the land, wherein the common is to be had, there shall be no apportionment; because common appurtenant is against common right. But this kind of common shall be apportioned by alienation of part of the land to which it is appurtenant.[2] This doctrine was followed in New-York in an early case.[3] The principle which runs through the cases is this: that the land which gives a right of common to the owner shall not be so alienated as to increase the charge or burden on the land out of which the common is to be taken; and that when the right is extinguished or gone, as to a portion of the land entitled to common, it is extinct as to the whole; for, in such case, common appurtenant cannot be extinct in part, and be *in esse* for part, by the act of the parties. Hence, where the owner of land, out of which the common is appurtenant, purchases part of the land out of which the common is to be taken, or the owner of part of the land out of which common is to be taken purchases the land, or part of the land, to which the common is ap-

[1] The above is abridged from Cruise's Digest, title Common.

[2] Cruise's Dig. tit. 23, Com. §§ 36, 37. 1 Inst. 121, a. Tyrringham's case, 4 Rep. 37, a.

[3] Livingston v. Ten Broek, 16 J. R. 14 Wyat Wild's case, 8 Co. 78. b.

purtenant, the right of common becomes extinct, not only as to the part, but as to the whole.

The grantee in fee of a right of common in gross, and without number, may alien it, and it descends to his heirs; but it cannot be aliened in such a way as to give the entire right to several persons, to be enjoyed by them separately. And where a right of common in gross descends to several persons as tenants in common, or parceners, it seems it cannot be divided between them, but there must be a joint enjoyment of it.[1]

Common of estovers cannot be apportioned; and if the person entitled to common, convey his land to which it is appurtenant, part to one person, and part to another, the right is extinguished.[2]

Common of pasture, whether appendant or appurtenant, is apportionable.[3]

Rents and profits, not only when arising from privity of contract, but from adverse claims and titles asserted by different persons, sometimes resolve themselves into matters of account. The dealings between landlord and tenant are often complicated, arising out of stipulations for repairs and improvements, for which compensation is to be made, or from the mode of payment of the rent itself.

Courts of equity, when resorted to for the purpose of an account of mesne profits, will, in many cases, consult the principle of convenience.[4] Lord Hardwicke, in a bill brought for a share in the New river water, and for an account and mesne profits, from the death of the father of the defendant's wife, said, that though the plaintiffs had not established their title at law, he was of opinion they were proper in coming into equity for the remedy, in order to have a discovery of the deed, under which the title arises, to have it produced at all trials at law, and to have attested copies. A *bare discovery* not being sufficient, some relief is necessary; if there was any doubt of the title, I would send them to law. But the bill is to have the benefit of the settlement, and for proper directions necessary to be given concerning it; and therefore, though it is matter of law, yet the court will determine upon it notwithstanding, for it is not necessary for every legal question to be sent to law. There is likewise another relief prayed, *an account of rents and profits.*

[1] Lyman v. Abeel, 16 J. R. 30.

[2] Van Rensselaer v. Radcliff, 10 Wend. 639. Livingston v. Ketchum, 1 Barb S. C. R. 592.

[3] Van Rensselaer v. Radcliff, 10 Wend. 639.

[4] Fonb. Eq. B. 1, ch. 3, § 3, note k. Townsend v. Ash, 3 Atk. 337.

In all cases where questions have arisen about shares in water-works, the parties have constantly come into equity for mesne profits; for though it is a legal estate and corporeal inheritance, yet no one proprietor could receive the profits himself, but the company or their officers are the common hand to receive profits, and there is no other way to come at it.

Where an estate is under such a management, though the legal estate is in the proprietors, it would be absurd to send the plaintiffs to law, for it would be difficult to bring ejectments for a thirty-sixth part and bits of land in several counties, and to bring actions of trespass against the *tertenants*, would be very extraordinary, as the management is in the company And therefore, in point of remedy, there cannot be a stronger case to come here for an account of profits.[1]

The cases in which an account of rents and profits is decreed, where the legal estate has not been previously established, proceed upon that respect which, in justice, is due to the interest of persons, who, by infancy, fraud, &c., have been prevented from pursuing their legal rights.[2] In general, the rule in equity is the same as at law; and as trespass will not lie for the mesne profits till possession is recovered, so neither can a bill be brought for an account thereof till then.[3] A court of equity will decree an account against an executor, upon the special ground that the plaintiff was prevented from recovering in ejectment by an injunction at the instance of the occupier, who ultimately failed both at law and in equity.[4] If the court did not decree an account in such case, its interference would work a wrong, because the plaintiff might have recovered at law, in the lifetime of the testator, if he had not been so restrained.

Courts of equity do not suffer a right to be without a remedy, and therefore, where there is no remedy at law, equity will certainly grant one; especially where the right is clear, but from the want of particular evidence, unavailable at law.[5] Thus, if the deed by which rent is created be lost, or the premises or the days of payment are stated to be uncertain, courts of equity will interpose.[6] So where a distress is obstructed by fraud, or there are no demesne lands on which to distrain.[7] Or where no distress can be made, the subject being of an incorporeal nature.[8] The remedy to collect rent by distress having been abolished in this state,[9] it would seem that

[1] Townsend v. Ash, 3 Atk. 337.

[2] Fonbl. Eq. B. 1, ch. 3, § 3, note k.

[3] Norton v. Frecker, 1 Atk. 525. Pultney v. Warren, 6 Ves. 91.

[4] Pultney v. Warren, 6 Ves. 73.

[5] Fonbl. Eq. B. 1, ch. 3, § 3, note k.

[6] Id. Holder v. Chambry, 3 P. Wms 257, per Talbot, Ch.

[7] Davy v. Davy, 1 Ch. Cas. 147.

[8] Thorndike v. Allington, 1 id. 79.

[9] Laws of 1846, p. 369.

equity should interpose in all cases, when the right is clear, and the remedy at law doubtful, or inadequate. In an early case, before Chancellor Kent, before the right of distress was abolished, the chancellor said: "Rent is recoverable in equity, where the remedy has become difficult or doubtful at law, or where the premises are uncertain." He approved of the remark of Lord Thurlow, that where the remedy at law was lost, or deficient, or the premises were uncertain, equity would interfere; and he granted relief in the case before him, on account of the "apparent perplexity and uncertainty of the title, and of the extent of the defendant's responsibility."[1]

But a court of equity will not aid the landlord in collecting his rent, while he is proceeding with an ejectment suit against the tenant to recover the premises for a condition broken; the remedy in equity being wholly inconsistent with the other proceeding.[2] The landlord, after he has reentered for a forfeiture of the lease, may recover the rent which accrued previous to such forfeiture, in an action of debt or upon the covenants in the lease. But for rent which became due subsequently to that time he cannot recover as landlord; and his only remedy is to proceed for the mesne profits against the lessee, or other person, who has held the possession of the premises adverse to his claim.[3]

At law the assignee of the lessee, who after enjoying the premises, assigns to a stranger, is not liable for the rent which accrued during his occupancy, for the reason that there is no privity of contract to charge him as assignee. The landlord is therefore without a remedy at law. But a court of equity will require the assignee to account for the rent which accrued during the time he enjoyed the land, and before he assigned.[4] But equity will not compel the assignee to perform the covenants which run with the land, *after* he has assigned, any more than a court of law. By the assignment, the assignee escapes from the rent which accrues subsequent to such assignment.[5]

Where the plaintiff had a rent charge settled upon her for her jointure, with power of distress, and there being great arrearages of rent and no sufficient distress on the premises to countervail the rent, she filed a bill against the devisee of the inheritance, that a sufficient distress might be set out, or that she might be permitted to hold and enjoy the land until

[1] Livingston v. Livingston, 4 J. Ch. R. 287.

[2] Stuyvesant v. Davis, 9 Paige, 428.

[3] Id.

[4] Treackle v. Cole, 1 Vern. 165. Valiant v. Diomede, 2 Atk. 546, 548. City of London v. Richmond, 2 Vern. 421.

[5] Same cases. Fonbl. Eq. B. 1, ch. 5, § 5, and note y.

satisfied of the arrears and the growing payments. But the lord keeper denied relief, declaring that the law never gives any other remedy than that which the party has provided for himself; and the remedy here being only by distress, and not to enter upon and hold the land, declared he would not relieve the plaintiff, *unless some particular fraud had been proved;* as letting the land lie fresh, or depasturing it in the night time, on purpose to prevent a distress; and if that were the case, such fraud by tenant for life ought not to turn to the prejudice of the remainderman, to charge the land with arrears, which incurred in the time of the tenant for life.[1] This case shows that the fraudulent deprivation of the landlord by the tenant, of the remedy by distress, will give jurisdiction to a court of equity to afford relief. In another case, the master of the rolls afforded relief to the devisee of a rent charge, with power of distress, and decreed satisfaction of the rent, and that the plaintiff enter and enjoy the premises until satisfied.[2] The case is too loosely reported, to determine on what principle it turned. As it was decided only a month after the preceding case, it is probable that the remedy by distress had been fraudulently defeated, or that the demise contained a clause of re-entry, on non-payment of the rent.

Where a lease was made of a coal mine to A., reserving rent in trust for five others, to each of them one-fifth. The five partners entered and worked the mine, and took the benefit of it, and sometime afterwards the lessee became insolvent, and the mine unprofitable, and it was flung up and abandoned by the partners. It was decreed that the lessee should pay to the plaintiff the contributive moneys he had received from each of the *cestui que trusts* towards working and carrying on the coal mine; and if that should not prove sufficient, the *cestui que trusts* that were living, and the representatives of such as were dead, and who were all before the court, to contribute each one-fifth towards satisfying the plaintiff the arrears of rent that had incurred during the time they had concerned themselves in taking the profits.[3] In this case, it is obvious that there was no remedy at law against the *cestui que trusts*, and it is perfectly reasonable, as they enjoyed the profits, while the lease was a beneficial one, so they should bear the loss. *Qui sentit commodum, sentire debt et onus.*

It is said by respectable authority, that if the use of the thing be entirely lost, or taken away from the tenant, the rent ought to be abated or

[1] Champernon v. Gubbs, 2 Vern. 382.
[2] Foster v. Foster, 2 id. 386.
[3] Clavering v. Westley, 3 P. Wms. 402.

apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and therefore, if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant, without his default, wants the enjoyment of part of the thing, which was the consideration of his paying the rent; nor has the lessor reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea had covered.[1]

If, however, part of the land be burnt with wild fire, that shall make no abatement or apportionment of the rent, because the use of the land is not thereby taken away, and the land may be again restored to its former fertility by the care and industry of the tenant.[2]

On the same principle, a tenant of premises demised by a written agreement is liable for rent accruing due after the premises have been burnt down, and are no longer habitable.[3] And there is no equity in favor of the lessee in such case, though not liable to repair in case of fire, for an injunction, against an action under the contract for payment of rent, upon the destruction of the house by fire.[4]

It is well settled, as has been stated elsewhere, that the tenant is liable on his covenant to pay rent[4] though the premises be destroyed by fire.[5] And he is so liable, in debt, on the privity of estate, there being a covenant to pay rent in the lease.[6]

In one case where the landlord, after the burning of the house, *received the insurance money*, but neglected to rebuild, and sued the tenant for rent accruing subsequent to the fire, Lord Northington said, the justice of the case was so clear, that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that he was surprized it should be looked upon as so clear a thing, that there should be no defense to such an action at law; and that such a case as this should not be considered as much an eviction, as if it had been an eviction of the title; for the destruction of the house is the destruction of the thing. Though this covenant does not bind the defendant to rebuild, yet when an action is brought for rent after the house is burnt down, there is a ground of equity for an injunction, till the house is rebuilt.[7] The action was compromised, and no decree was pronounced.

[1] Bacon's Abr. tit. Rent, M. p. 520.
[2] Id.
[3] Baker v. Haltzapffell, 4 Taunt. 45.
[4] Haltzapffel v. Baker, 18 Ves. 115. Belfour v. Weston, 1 D. & E. 311.
[5] Mark v. Cooper, 2 Ld. Ray. 1477; S. C. 2 Str. 763.
[6] Hallet v. Wylie, 3 J. R. 44.
[7] Brown v. Quilter, Ambl. 621.

This case is distinguishable from those cited, in several respects. The landlord having *received the insurance money for* the house which was burnt, the plaintiff insisted that the landlord should either rebuild the premises, or let him, the tenant, have the insurance money toward satisfaction of his loss. The landlord in his answer insisted on his right to the insurance money, and the rent, *but offered to discharge the plaintiff from the lease.* This the chancellor considered raised an equity in his favor, and was about to give directions accordingly, when the matter was compromised. Van Ness, J., in Hallet v. Wylie, speaks of this case as turning on its special circumstances, as does Buller, J., in Doe v Sandham.[1]

The cases on this subject might be greatly multiplied, but enough has been said to show the nature and extent of equity jurisdiction in matters of rent, and the principles on which it is founded.

Although the action of waste is a common law action and the proceedings thereon are regulated by the statute,[2] there are many cases in which equity interposes its remedial powers, and in which the action terminates in account. In an early case the supreme court of New-York held, that where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste; but he cannot cut down *all* the wood and timber, so as permanently to injure the inheritance. And to what extent the wood and timber, on such land, may be cut down, without waste, is a question of fact for the jury, under the direction of the court.[3] That action was at law.

Courts of equity frequently interfere by injunction to stay waste; and a mere threat to commit waste is sufficient to grant an injunction upon; it not being necessary for the plaintiff to wait till the waste is actually committed.[4] This subject will be more fully treated under the head of Injunction.

In New-York, it was held, in a recent case, that the doctrine of waste, as understood in England, is not applicable to a new and unsettled country. It was said that where the whole of a farm, when leased, is in a wild and uncultivated state, with the exception of a few acres, and for the use of it the lessee agrees to pay rent, the parties will be held to have intended that the lessee should be at liberty to fell part of the timber, in order to fit the land for cultivation. But when a tenant cuts trees upon the demised

[1] 1 T. R. 705, 709.
[2] 2 R. S. p. 333.
[3] Jackson v. Brownson, 7 J. R. 227.
[4] Gibson v. Smith, 2 Atk. 182.

premises, not for the purpose of preparing the land for cultivation, but for the sake of the profit to be derived from the sale of the timber, he is guilty of waste. The right to account, it was said in the same case, for waste already committed, is incidental only to the right to file a bill to prevent future waste. A bill will not lie merely for an account for waste, as the plaintiff has an ample remedy at law. And when a bill is filed to prevent future waste, and also to prevent the removal of timber already cut, the court will not, unless under very special circumstances, grant an injunction to prevent the removal of timber already cut.[1]

When the mischief will be irreparable and the defendant is insolvent, it is now of course for equity to afford relief.[2] The jurisdiction of equity is firmly established.[3] The remedy there is broader than at law; and equity will interpose in many cases, and stay waste, when there is no remedy at law. If there was an intermediate estate for life between the lessee for life and the remainderman or reversioner in fee, the action of waste would not lie at law; for it lay on behalf of him who had the next immediate estate of inheritance. Chancery will interpose in that case; and also when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste.[4]

We shall now bring this chapter to a close, with a few remarks on the general subject of an account.

It is laid down in the treatises on equity practice, that under a decree for an account, both parties are actors, and either may proceed before the master in taking it.[5]

The mode of taking an account before the master was settled by Chancellor Kent, in a leading case,[6] at an early day, in which the English practice, by charge and discharge, was recognized. The practice was adopted of requiring the parties to bring in their respective objections to the re-

[1] Kidd v. Dennison, 6 Barb. 9. Watson v. Hunter, 5 J. Ch. R. 168. Spear v. Cutler, 4 How. Pr. R. 175. Livingston v. Livingston, 6 J. Ch. R. 497.

[2] Spear v. Cutler, 4 How. Pr. R. 175. Winchip v. Pelts, 3 Paige, 259. Hawley v. Clowes, 2 J. Ch. Cas. 122. Hanson v. Gardiner, 7 Ves. 308. Thomas v. Oakly, 18 Ves. 184.

[3] Sarles v. Sarles, 3 Sand. Ch. R. 601. 4 Kent's Com. 76–78.

[4] Perrot v. Perrot, 3 Atk. 94. Aston v. Aston, 1 Ves. 264. Vane v. Barnard, 2 Vern. 738.

[5] Hoffman's Master, 37. Fowl. Exch. Pr. 2, 277.

[6] Remsen v. Remsen, 2 J. Ch. R. 495.

port, on being furnished with a draft of it, and confining the parties in their exceptions, to the objections thus brought before the master.

A *charge* is defined to be, a statement in writing of the items with which the opposite party should be debited, or should account for, or of the claim of the party making it. It is more comprehensive than a *claim*, which implies only the amount due to the person producing it, while a *charge* may embrace the whole liabilities of the accounting party.[1]

Thus, in prosecuting a creditor's bill, the *charge* of the acting plaintiff would contain all the receipts of the executor and his representatives, while that of a creditor coming in under the decree, would include only his own demand. On leaving the charge with the master, a summons was taken out for the opposite party to proceed upon the charge. On the attendance before the master, the party supports his charge, item by item, either by the pleadings, the examination of parties, or by evidence. If the items, or any of them, in the charge are improper, the objection to them is considered, in disposing of the charge; and when the charges are all allowed or disallowed, then the opposite party exhibits his discharge, and takes out a summons for the opposing party to proceed upon it. The discharge is not merely a *defense* to the charge; it is only a statement of disbursements, and an offset of counter-claims. In case of delay by either party, the other party takes out a warrant to proceed before the master.[2]

The above, which was essentially copied from the English practice, leads to numerous summonses and attendances before the master, and perhaps warrants, and was superseded by Chancellor Walworth's 107th rule. By that rule, all parties accounting before the master were required to bring in their accounts in the form of debtor and creditor; and any of the other parties who should not be satisfied with the accounts brought in, were at liberty to examine the accounting party, upon interrogatories, as the master might direct. Every charge, discharge or state of facts brought in before a master, was required to be verified by oath as true, either positively, or upon information and belief.

The chancellor decided, that when a party was required to bring in his account before the master, in the form of debtor and creditor, under the 107th rule, he must bring in his *whole account*, and for the *whole time* for which he was accountable, as established by the decretal order of the court. It must be accompanied by the usual affidavit of the party, that the account, including both *debits* and *credits*, is correct, and that he does not know of any error or omission in the account to the prejudice of any of the other parties. In the same case, the chancellor said, that

[1] Hoffman's Master, 36. [2] Id. 38, 39.

one object of the 107th rule was to prevent the delay and expense of a separate summons and attendance upon every proceeding in the master's office.[1]

In organizing the courts under the constitution of 1846, after the abolition of the court of chancery, and the transfer of equity jurisdiction to the supreme court, the 107th rule of Chancellor Walworth was not retained. But it was provided by the 148th rule, adopted in August, 1847, that in cases where no provision was made by statute, or by the rules, the proceeding in the court, in equity, should be according to the customary practice, as it theretofore existed in the court of chancery, in cases not provided for by statute or the written rules of the court. After the adoption of the code of procedure, and the consolidation of the rules of law and equity, there was the same saving of the customary practice of the courts, in cases not provided for in the rules, or the code.

The practice in New-York, since the code, seems to require that such matters of account, as cannot be conveniently tried by a jury, should be referred to one or more referees, except when the trial is had before a single judge. The trial by referees is conducted in the same manner, and upon a similar notice, as a trial by the court. They have the same power to grant adjournments as the court upon such trial.[2] They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner, but not otherwise, and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon, in the same manner, as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict.

There may be cases, under the code, where the *whole* issues are not referred. It is presumed that an account may be taken before a referee, and the subsequent proceedings founded on his report, may be had before the court. But the existing rules provide for no such case, nor do they prescribe the manner in which an account in any case shall be taken. The method by charge and discharge, and exceptions to the decision of the referee, as in the former practice before a master, has become inapplicable under the code. No doubt, either a judge or referee possesses the power of requiring the accounting party to bring in his account, in the form of debtor and creditor, as heretofore. His power in this respect is incident to his power over the subject.

Under the former chancery practice in New-York, upon a bill to open a *stated* account, if errors or mistakes were distinctly charged, leave

[1] Story v. Brown, 4 Paige, 114. Code, 266 to 273.

would be given to *surcharge* and *falsify*.[1] And in this proceeding, the party might take advantage of error in *law*, as well as error in fact.[2]

The terms *surcharge* and *falsify*, have a technical meaning. A *surcharge* is the statement of items omitted on the *debit* side of the account of the accounting party, who has brought in his accounts in the mode prescribed by the 107th rule of Chancellor Walworth, that is, by debtor and credit. In other words, a *surcharge* supposes *credits* to have been omitted which ought to be allowed to the other party.[3] A *falsification* supposes that some item in the *debits* is entirely false, or in some respects erroneous. Both terms imply that the balance of the account is wrong, but they attribute the error to different causes; the first to the *omission* of one or more items, with which the accounting party should *debit* himself, or in other words *credit* his opponent, and the other to a falsification, in whole or in part, of items which ought not to be charged.[4]

An account made up and subscribed by the parties, containing the material dealings of the parties, and purporting to be an account stated, will, in general, be so treated by the court, and it will lie with the party who impeaches it to point out omissions and mistakes, whether fraudulent or accidental.[5] But an account may become stated by lapse of time. It has been often held, says Chancellor Kent, that if a party receives a stated account from abroad, and keeps it by him for any length of time, (one case says two years,) without objection, he shall be bound by it.[6]

In a case in the supreme court of the United States, where to a bill filed to set aside a stated account, on the ground of fraud, or to correct errors, and the stated account was pleaded in bar, Ch. J. Marshall said that the plea must be sustained, except so far as it may be in the power of the other party to show, clearly, that errors have been committed in the account. No practice, he observes, could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful, or by only probable testimony. But, if

[1] Stoughten v. Lynch, 2 J. Ch. R. 217. Perkins v. Hart, 11 Wheat. 256. Kinsman v. Barker, 14 Ves. 579. Mad. Ch. Pr. 82, 83.

[2] Roberts v. Kuffin, 2 Atk. 112. Consequa v. Fanning, 3 J. Ch. R. 587; S. C. on appeal, 17 J. R. 511.

[3] Hoffman's Ch. Pr. 537, 522. 1 Barb. Ch. Pr. 507. Story's Eq. § 525.

[4] Id. and Pitt v. Cholmondeley, 2 Ves. 565, 566.

[5] Troop v. Haight, 1 Hopk. 239.

[6] Murray v. Tolland, 3 J. Ch. R. 575. Willis v. Jernegan, 2 Atk. 251. Tickell v. Short, 2 Ves. 239. Freeland v. Heron 7 Cranch, 147.

palpable errors be shewn, errors which cannot be misunderstood, the settlement must be so far considered as made upon absolute mistake, or imposition, and ought not to be obligatory on the injured party, or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors, which he does not plainly establish, cannot be supposed to exist.[1]

The prima facie presumption is in favor of an account which has been stated by the parties, or become so by acquiescence. And the general doctrine is well settled that the account will not be disturbed, except there be fraud or mistake in the settlement, and that established by clear proof,[2] or there be errors which are palpable, or clearly proved.[3]

A party seeking to open a settled account, in a proceeding before a surrogate for an account, should be able to show such a case as would have enabled him to file a bill in equity to surcharge and falsify such account.[4]

The court is not, in general, inclined to open accounts of long standing. Stale demands are never favored in equity.[5] In a case before Chancellor Kent, where a merchant, in embarrassed circumstances, borrowed money at different times from his confidential clerk, who took various bonds and securities for such loans, and for which, by agreement, he was to allow usurious interest, and during the period of ten years the parties from time to time came to a settlement of their accounts, and the merchant gave his bonds and further securities for the balance of principal and interest, the court ordered all the multiplied obligations and settlements to be set aside, and the whole accounts at large to be opened between the parties from the commencement of their dealings; it appearing in this case that there was proof not only of mistakes and differences in their accounts, but there were many suspicious circumstances leading strongly to an inference of usury, oppression and fraud.[6] It was also a case where undue advantage was taken of the necessities of the principal, and where the confidence, which the latter reposed in his clerk, was abused.

Before the statute of limitations was extended to demands recoverable in equity, the court was unwilling to decree an account, where the

[1] Chappedelaine v. Dechemaux, 4 Cran. 306.

[2] Lee's Adm. v. Reed, 4 Dana, 112.

[3] Baker v. Riddle, Baldw. C. C. R. 418.

[4] Valentine v. Valentine, 2 Barb. Ch. R. 430, 436.

[5] Tilghan v. Tilghan, 1 Bald. C. C. R. 495. Bolifuer v. Weyman, 1 McCord's Ch. R. 156. Gregory v. Forester, id. 318, 332. Moers v. White, 6 J. Ch. R. 360.

[6] Barrow v. Rhinelander, 1 J. Ch. R 550.

transactions had become obscure and entangled by delay and time. There was, however, no precise and definite rule on the subject, but each case was left to depend upon the exercise of a sound discretion upon the circumstances.[1]

This matter is now regulated by the code. The limitation is now six years; but where relief is sought on the ground of fraud, in cases which heretofore were solely cognizable in the court of chancery, the cause of action is not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud.[2]

[1] Raynar v. Pearsall, 3 J. Ch. R. 578. Ray v. Bogert, 2 J. Cas. 432. Ellison v. Moffat, 1 J. Ch. 46.

[2] Code, § 91.

CHAPTER III.

OF FRAUD.

SECTION I.

OF ACTUAL FRAUD.

WE now pass to the head of Fraud, another branch of jurisdiction which courts of equity exercise concurrently with courts of law. This jurisdiction is probably coeval with the establishment of the court of chancery, and was originally exercised only in cases where there was no remedy by the ordinary course of law.[1] While the court of star chamber was in being, there was little occasion for the exercise of this jurisdiction, as that court possessed an extensive jurisdiction in cases of fraud, by not only relieving the plaintiff, but by punishing the defendant for his fraudulent conduct. Upon the abolition of that court, in the reign of Charles the first, the jurisdiction of equity, in matters of fraud, was more actively exerted, sometimes concurrently with courts of law, and sometimes in cases where those courts could not afford relief.[2]

In a great variety of cases, fraud is as effectually remediable in a court of law as in courts of equity. Whenever the state of the pleadings and evidence properly present the case to the consideration of a court of law, the redress is generally as complete in the latter court as when it is administered by a court of equity. In cases where fraud is not *penal*, equity has concurrent jurisdiction with courts of law, except in fraud in obtaining a will. In such case, if the will be of real estate, the question as to its valid execution belongs primarily to the surrogate's courts, but ultimately to the consideration of a court of law, upon an issue *devisavit vel non;* or, which presents the same question, in an action at law between the heir and devisee.[3] The question whether such will was obtained by

[1] 4 Inst. 84.

[2] 1 Mad. Ch. Pr. 89. 1 Fonbl. Eq. B. 1, ch. 2, § 12.

[3] Laws of 1837, p. 524. 3 Bl. Com. 431. Pemberton v. Pemberton, 13 Ves. 297.

fraud or undue means, is involved in the same inquiry. The course upon a bill by an heir impeaching a will, is to direct him to bring an ejectment, equity removing obstacles which will prevent a trial upon the merits, if any such are interposed.[1]

If the will relates only to personal estate, the surrogate of the proper county has exclusive jurisdiction, and the probate of the will is conclusive. And the surrogate must determine all questions of fraud, imposition, and undue influence in procuring such will, as well as the general question of capacity, subject to appeal, and subject to its being revoked, or declared void by a competent tribunal, as declared by law.[2] The court of chancery in this state possessed no original jurisdiction to try the validity of wills of personal estate. It had only an appellate jurisdiction from the decision of the surrogate.[3] In England, too, it is well settled that the probate, unrevoked, is conclusive both in courts of law and of equity, as to the appointment of executors, and the validity and contents of the will, so far as it extends to personal property; and it cannot be impeached by evidence, even of fraud.[4]

The question has often been discussed in the English courts, whether a court of equity will grant relief in cases of wills obtained or suppressed by fraud, and it is now well settled in the negative. The cases are elaborately reviewed by Lord Cottenham in a recent case.[5]

But though a court of equity will not set aside a will, as obtained by fraud, after it has been admitted to probate, it has been held that equity will declare a trust upon a will, in the case of a notorious fraud upon a legatee; as if the drawer of a will should insert his own name instead of the name of the legatee; in such case, it is said, that the person whose name is so inserted by fraud would be a trustee for the real legatee.[6] This has never been supposed as infringing upon the jurisdiction of the ecclesiastical courts.[7]

[1] Laws of 1837, p. 524. 3 Bl. Com. 431. Pemberton v. Pemberton, 13 Ves. 297. Smith v. Carll, 5 J. Ch. R. 118. Clarke v. Sawyer, 2 Barb. Ch. R. 411.

[2] Muir v. Leake's Trustees, 3 Barb. Ch. R. 477. Clark v. Fisher, 1 Paige, 171. 2 R. S. 61, § 29. Vanderpoel v. Van Valkenburgh, 2 Seld. 190. Bogardus v. Clark, 1 Edw. 266; S. C. 4 Paige, 623. Hornsby's will, 2 Paige 431. Van Rensselaer v. Morris, 1 id. 13.

[3] Colton v. Ross, 2 Paige, 396.

[4] 1 Will. Ex. 339. Archer v. Mosse, 2 Vern. 8. Plume v. Beale, 1 P. Wms. 388. Griffiths v. Hamilton, 12 Ves. 298.

[5] Allen v. MacPherson, 1 Phil. R. 133.

[6] Marriot v. Marriot, 1 Str. 667, approved by Lord Cottenham, in Allen v. MacPherson, 1 Phil. R. 144. Gaines and wife v. Chew, 2 How. S. C. R. 619, 645, 646. Traver v. Traver, 9 Pet. 180.

[7] Fonbl. Eq. B. 4, part 2, ch. 1, § 2, n. a

With regard to the definition of the term fraud, it was well remarked by Lord Eldon, in one case, that the court has never ventured to lay down, as a general proposition, what shall constitute fraud.[1] Should a fixed and invariable rule be devised, other means of avoiding the equity of the court would soon be found out. Hence, in cases of oppressive bargains, if the least tincture of fraud is found, relief has always been given.[2] And when it is considered how various and complicated are the transactions of human affairs, how greedy and insatiable is the appetite for gain, and how resistless the temptations of avarice, we can readily acquiesce in the remark, that fraud is infinite, and that any attempt to limit the jurisdiction of relief, would be followed by new schemes, which the fertility of man's invention would contrive.[3]

Fraud has been defined to be, any *kind of artifice by which another is deceived.* Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.[4]

Although some exception has been taken to this definition, yet it is esteemed by writers of high authority as sufficiently descriptive of *actual, moral* fraud.[5] *Collusion,* is considered in a court of equity as fraud.[6] But this definition does not embrace a large number of acts of *constructive* or *implied* fraud, which in their effects are equally prejudicial to the rights of others as *actual, moral* fraud, and which are alike relievable by courts of equity. Any act of omission or commission, contrary to legal or equitable duty, trust or confidence, justly reposed, and which is injurious to another, though it falls short of moral fraud, is, in the sense of a court of equity, within its remedial jurisdiction.[7] Such acts or omissions are usually denominated frauds, though they be so only constructively. Thus, an indulgent parent, who, unconscious of his insolvency, and out of love and affection to his son, gives him an estate, cannot thus defeat the claims of his creditors; nor can he, in the eye of a court of equity, escape the imputation of fraud, by evidence that he was ignorant of his insolvency, and governed rather by motives of love towards his son, than by a design to cheat his creditors. Equity accepts no such apology for acts, or omissions, which tend directly to defraud. And even the innocence of a party who has profited by the fraud, will not entitle him to retain the fruit of another man's misconduct, or exempt him from the duty of restitution.[8]

[1] Mortlock v. Buller, 10 Ves. 306.
[2] Per Lord Hardwicke, in Lawley v. Hooper, 3 Atk. 278.
[3] Mad. Ch. Pr. 204.
[4] Id. 205.
[5] Story's Eq. Jur. § 187. Jeremy on Eq. Jur. B. 3, pt. 2, p. 358. Adams' Eq. 176
[6] Garth v. Cotton, 3 Atk. 757.
[7] Belcher v. Belcher, 10 Yerg. 121.
[8] Huguenin v. Baseley, 14 Ves. 273, 289.

Before entering upon the subject, it may be well to consider what is meant by the common maxim, that fraud is *odious and never to be presumed.*[1] This maxim, when correctly understood, is true as well in equity as in law. The maxim is predicable only of those acts which stand alone. It rests upon the same footing as the presumption of innocence. It means merely that the *onus probandi* is cast upon him who asserts fraud.[2] It does not mean that guilt or fraud may not be established by presumptive evidence. In truth, they are established by that species of evidence, in most instances.[3]

Lord Hardwicke, in one case,[4] enumerates four species of fraud, all of which rest upon presumptive, or circumstantial evidence. First, fraud arising from facts and circumstances of imposition, which is the plainest case: secondly, fraud may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept, on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice; a third is that which may be presumed, from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed. But it is wisely established in equity, to prevent taking surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience, as to take advantage of his ignorance. A fourth kind of fraud may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition, and deceit on the other persons, not parties to the agreement.

The most obvious cases of actual fraud are such as arise from the *suggestio falsi*, or the *suppressio veri*.[5] In order to constitute a fraud of the first class, it is said there must be a representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his con-

[1] Bath and Montague's case, 3 Ch. Cas. 85. Fonbl. Eq. B. 1, ch. 2, § 8. Cowen & Hill's Notes, 298. Cro. Car. 550.

[2] Fleming v. Slocum, 18 J. R. 403. C. & H. Notes, 301, 484.

[3] Waterbery v. Sturtevant, 18 Wend. 353–362, per Cowen, J.

[4] Chesterfield v. Jansen, 2 Ves. 155; S. C. 1 Atk. 351, 2.

[5] Fonbl. Eq. B. 1, ch. 2, § 8. Jarvis v. Dale, 1 Vern. 20. Broderic v. Broderic, 1 P. Wms. 240.

tract, or act.[1] If the fact, concerning which the misstatement is made, is not a material inducement to the contract, or, if it was not relied on by the complaining party, there is no reason why a court of equity should interpose.

The requirement that the representation shall be not only false, but false within the knowledge of the party making it, distinguishes a fraudulent representation, from an erroneous affirmation, by way of covenant or warranty. Affirmations of the latter kind bind the party making them, although he were himself honestly mistaken, because he has explicitly agreed that they shall do so; but if a warranty or covenant is not given, a mere representation, *honestly made, and believed at the time to be true by the party making it*, though not true in fact, does not amount to fraud.[2]

It is a very old head of equity, says Chancellor Kent,[3] adopting the language of Lord Eldon,[4] that if a representation be made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knew that representation to be false. He held that if there was a jurisdiction at law upon the doctrine, as was held by the king's bench in Pasley v. Freeman,[5] there was a concurrent jurisdiction in equity.

At law, the plaintiff must allege and prove, if his action be founded on the fraud, that the representation was made with intent to cheat and defraud the plaintiff, and was made by the plaintiff knowing it to be false. This falsity may consist in the *assertion* of an untruth, as well as the *suppression* of the truth.[6] If the action be founded on the warranty, and the representation be proved, in connection with other facts, to establish such warranty, the *scienter* need not be alleged or proved.[7] No particular form of words is necessary to constitute a representation, a warranty. There must be a direct and express affirmation in contradistinction from opinion; and it must be shown that it was *intended* as a warranty, and not merely the expression of the judgment of the vendor.[8]

[1] Adams' Eq. 177, 351. Ball v. Lively, 4 Dana, 370. Clarke v. White, 12 Pet. 178. Evans v. Bicknell, 6 Ves. 173, 182. Attwood v. Small, 6 Cl. & Fin. 444, 445, per Lord Brougham.

[2] Adams' Eq. 178. Young v. Covill, 8 J. R. 23. Allen v. Addington, 11 Wend. 374. Freeman v. Baker, 5 Barn. & Ad. 797.

[3] Bacon v. Bronson, 7 J. Ch. R. 201.

[4] Evans v. Bicknell, 6 Ves. 182.

[5] Pasley v. Freeman, 3 T. R. 51.

[6] Id. Allen v. Addington, 7 Wend. 9; S. C. 11 Wend. 374. Williams v. Wood, 14 Wend. 126. 2 Chitty's Pl. 278, notes.

[7] 1 Chitty's Pl. 139. Williamson v. Allison, 2 East, 446. Attwood v. Small, 6 Cl. & Fin. 444, 445.

[8] Chapman v. Murch, 19 J. R. 230. Swett v. Colgate, 20 J. R. 196.

In equity, relief will be granted, in some cases, on the ground of fraud although the party thus misrepresenting a material fact, made the assertion, *without knowing* whether it was true or not.[1] The consequences to the party who acted upon the faith of the representation are the same, whether he who made it knew it to be false, or was ignorant whether it was true or false. In a moral as well as legal point of view, it is as unjustifiable to affirm as true, a fact which the party making the affirmation, does not know or believe to be true, as to assert for truth what he knows to be false. And if the assertion was made to influence the conduct of the other party in a matter of business, and it did influence him to his prejudice, equity will interpose and grant relief.[2]

And even if by mistake, and innocently, a party misrepresents a material fact, upon which another party is induced to act, it is as conclusive a ground for relief in equity, as a willful and false assertion.[3]

The cases place a representation, known by the party making it to be false, in the same category with a representation made with intent to deceive, whether the party making it knew it to be false or not.[4]

A fraud arising from the suppression of the truth, is as prejudicial to the party deceived, as that which springs from the assertion of a falsehood. And the courts have not hesitated to sustain recoveries, when the truth has been suppressed, with intent to defraud, as well as when a falsehood has been asserted, with the like intent.[5]

If an owner stands by, and knowingly suffers an innocent person to be misled by his silence, and to purchase his property without giving him notice of his title, a court of equity will treat it as a fraud upon the purchaser, and grant an injunction against the future assertion of that title by the owner.[6]

In the contracts of insurance and of suretiship, we find frequent applications of the principle which treats non-disclosure as equivalent to fraud, when circumstances impose a duty that the disclosure should be made. In the first case, the concealment of a material fact, which the insurer has a right to know, and which the other party is bound to communicate, is fatal to the policy, whether it occur through fraud, accident, or honest

[1] Ainslie v. Medlycott, 9 Ves. 21.

[2] Harding v. Randall, 3 Maine R. 332. Smith v. Richards, 13 Pet. 38. Trunbull v. Gadsden, 2 Strobhart's Eq. South Car. R. 14. McFerran v. Taylor, 3 Cranch, 281.

[3] Lewis v. McLemore, 10 Yerg. 206.

[4] Taylor v. Ashton, 11 Mees. & Wels. 400. Foster v. Charles, 6 Bing. 396; S. C. 7 id. 65.

[5] Allen v. Addington, 7 Wend. 9; S. C. in error, 11 Wend. 374. Fleming v. Slocum, 18 J. R. 403.

[6] The Brig Sarah Ann, 2 Sumner, 206

mistake.[1] In the case of a surety guarantying a contract, if there be a fact materially affecting the contract, misrepresented to him, or concealed from him, with the knowledge or consent of the party accepting the guaranty, the surety ceases to be liable.[2]

Fraudulent concealment, therefore, is only predicable of facts material to be known, and which the vendor is under an obligation to communicate, and the vendee is entitled to know. Mere non-disclosure is generally not equivalent to fraud. The maxim, *caveat emptor*, authorizes the contracting party to remain silent, and to avail himself of his superior knowledge.

The principles of natural justice and sound morals require more scrupulous good faith, candor and truth, in dealings with one another, than is exacted either by law or equity. As a matter of conscience, says Pothier, any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. The golden rule, which commands us to love our neighbor as ourselves, will not permit us to conceal from him any thing which we should be unwilling to have had concealed from ourselves, under similar circumstances. But the common law does not go to this length. Human tribunals have not the means of administering justice by such a scale. To do it effectually, requires the attributes of divine intelligence. Courts of justice aim at practical good and general convenience, rather than at theoretical perfection. They require the exercise of vigilance on the part of the buyer, to such defects in the article as are open to observation, and an entire freedom on the part of the seller, from any false representation, deception, or concealment, whether by words, actions, or signs. When the means of information are equally accessible to both parties, and neither does or says any thing tending to impose upon the other, the disclosure of facts, within the knowledge of one of the parties alone, tending to affect the value of the article, is not essential to the validity of the contract.[3]

The maxim, *caveat emptor*, applies both to the purchaser of real and personal property, and it is applicable to the *quality* of the article, and the *title* of the vendor in both cases. By the civil law, as observed by Lord Coke, every man is bound to warrant the thing that he sells, or con-

[1] Wilson v. The Herkimer Co. Mu. Ins. Co. 2 Seld. 53, 59. De Costa v. Scandaret, 2 P. Wms. 170. Carter v. Boehm, 3 Burr. 1905.

[2] Pidcock v. Bishop, 3 Barn. & Cr. 605. Weed v. Bentley, 6 Hill, 56. Jackson v. Duchaire, 3 T. R. 552. Steinman v. Magnus, 11 East, 390. Leeds v. Dunn, N. Y court of appeals, Dec. T. 1853, notes of decision, p. 38.

[3] Laidlow v. Organ, 2 Wheat. 178.

veys, albeit there be no express warranty, but the common law binds him not, unless there be a warranty, either in deed or in law.[1] The rule of *caveat emptor* has no application, where the defect is a *latent* one, and of such a nature as the purchaser cannot by the greatest attention discover it, and if, moreover, the vendor be cognizant of it, and do not acquaint the purchaser with the fact of its existence; for in this case the contract would not be considered binding at law, and equity would not enforce a specific performance.[2]

When the defects are *patent*, and such as might have been discovered by a vigilant man, or when the contract was entered into with full knowledge of them, equity will not afford relief. In the former case the rule is *vigilantibus non dormientibus jura subveniunt*, and in the latter, *scientia utrinque par pares contrahentes facit.*

With respect to real property, the rule applies as to the title, equally, whether the vendor is in or out of possession, for he cannot hold the lands without *some* title; and the buyer is bound to see it, and to inspect the title deeds at his peril. He does not use common prudence, as was well said by Lord Kenyon, in Pasley v. Freeman,[3] if he relies on any other security. The ordinary course on the sale of real estates is this: the seller submits his title to the inspection of the purchaser, who exercises his own, or such other judgment as he confides in, on the goodness of the title, but though it should turn out to be defective, the purchaser has no remedy, unless he takes a special covenant or warranty; provided there be no fraud practiced on him to induce him to purchase.[4] The vendor, says Chancellor Kent, in one case,[5] selling in good faith, is not responsible for the goodness of his title beyond the extent of his covenants. If a regular conveyance is made, containing the usual covenants for securing the buyer against the acts of the *seller*, and his ancestors only, and his title is actually conveyed to the buyer, the rule of *caveat emptor* applies against the latter, so that he must, at his peril, perfect all that is requisite to his assurance; and as he might protect his purchase by proper covenants, none can be *implied*. Thus, an administrator found, among the papers of his intestate, a mortgage deed, purporting to convey premises to him, and without arrears of interest. Not knowing it to be a forgery, he assigned it, covenanting not for good title in the mortgagor, but only that nothing had been done by himself, or the deceased mortgagee, to in-

[1] Co. Litt. 202, a.

[2] Seymour v. De Lancey, 3 Cowen, 445. Br. Legal Maxims, 608.

[3] 3 T. R. 65.

[4] Per Lawrence, J., in Parkinson v. Lee, 2 East, 323.

[5] Gouveneur v. Elmendorff, 5 J. Ch. R. 84.

cumber the property; and as this precluded all presumption of any further security, the assignee was held bound to look to the goodness of the title, and failed to recover the purchase money.[1] If he had, as Lord Mansfield said, in the same case, discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. But he did not covenant for the goodness of the title, but only, that neither he nor the testator had incumbered the estate. This case is quoted with approbation by Chancellor Kent, in Gouveneur v. Elmendorff, already cited, and was sanctioned by Lord Kenyon in Cripps v. Read,[2] and by the English common pleas in Johnson v. Johnson,[3] by the supreme court of New-York in Frost v. Raymond,[4] and by the court of chancery of the same state in Abbott v. Allen.[5] The same doctrine was in effect held by the present supreme court in a recent case.[6] In that case it was held, that the mere omission, in a contract for a quitclaim deed of premises, held by lease in fee, to state that they were subject to quarter sales, was no evidence of a fraudulent concealment. To sustain an action to recover back the consideration money, it must be shown, said the learned judge, that the defendant, in making the contract for the sale of the farm, misrepresented some material fact affecting his title, or that he intentionally concealed from the knowledge of the plaintiff some such fact.

This doctrine of *caveat emptor* has been applied to the demise of land for agricultural purposes, and of houses for occupation. Although there is some conflict in the cases, it seems now to be settled, that there is no contract, still less a condition, implied by law, on the demise of real property only, that it is fit for the purpose for which it is let. Hence, on the demise of land, or the vesture of land for a specific term, at a certain rent, there is no implied obligation on the part of the lessor, that it shall be fit for the purpose for which it is taken.[7] This principle has also been extended to the lease of a house and garden to be taken for actual occupation.[8] In the last mentioned case, the declaration stated that the plaintiff agreed to let to the defendant a *house* and *garden ground*, with the use of the fixtures therein, for the term of three years, at a rent payable quarterly, the tenant to preserve the messuage and premises in good and tenantable repair, by virtue of which the tenant entered and continued

[1] Bree v. Holbeck, Doug. 655.
[2] 6 T. R. 606.
[3] 3 B. & P. 162, 170.
[4] 2 Caines, 188.
[5] 2 J. Ch. R. 523.
[6] Camp v. Pulver, 5 Barb. 91.
[7] Sutton v. Temple, 11 M. & W. 52.
[8] Hart v. Windsor, 12 id. 68.

in possession until a quarter's rent accrued under and by virtue of the agreement. To this the defendant plead that the house was demised to the defendant for the purpose of his inhabiting the same, but that before, and at the time of the agreement, and also when the defendant entered, and from thence until and at the time of his quitting and abandoning the possession of the same, it was not in a fit state or condition for habitation, but in that state that the defendant could not reasonably inhabit, or dwell therein, or have any beneficial occupation of the same, by reason of the same being greatly infected with bugs, and not by reason of any act or default of the defendant; and that before the rent or any part thereof became due, he quitted the possession and gave notice thereof to the plaintiff, and ceased all further occupation of the same, and derived no benefit therefrom; and that from the commencement of the term until his so quitting, he had no beneficial use or occupation of the same. The jury having found for the defendant on the issues raised by the pleas, it was held, on motion for judgment *non obstante veredicto*, that the plea was no answer to the action, inasmuch as the law implied no contract on the part of the lessor, that the house was, at the time of the demise, or should be, at the commencement of the term, in a reasonably fit state and condition for habitation. Secondly, that the demise being of a house and *garden ground*, in order to make the plea good, it must be held that if a house be taken for habitation, and land for occupation, by the same lease, there is such an implied contract for the fitness of the house for habitation as that its breach would authorize the tenant to give up both; but it was held, thirdly, that there is no implied warranty on a lease of a house, or of land, that it is or shall be reasonably fit for habitation, occupation or cultivation.

So far as the foregoing case is in conflict with the earlier case of Smith v. Marrable,[1] the latter must be treated as overruled. There is, however, a slight distinction between the two cases. In Smith v. Marrable it was held, that there is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation; if it be not, as for example, where it is greatly infected with bed bugs, the tenant may quit it without notice.

The learned judge, in delivering his opinion in Hart v. Windsor, said: "The principles of the common law do not warrant the position that there is an implied warranty, on a demise of real property, that it is fit for the purposes for which it was let; and though in the case of a dwelling house *taken for habitation*, there is no apparent injustice in enforcing a contract

[1] 11 M. & W. 5

of this nature, the same rule must apply to land taken for other purposes —for building upon or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves by proper stipulations; and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

The subject, in its more general bearing, belongs to the doctrine of landlord and tenant. But it may be added here, that the doctrine in Hart v. Windsor, was fully confirmed in the subsequent case of Surplice v. Farnsworth.[1]

In New-York, before the revision of 1830, it was held, in conformity to the common law, that a conveyance in fee did not, in itself, imply a covenant of title, but the word "give," in such a conveyance, implied a warranty, for the life of the grantor;[2] that the words "grant" and "infeoff" imported a warranty, in an estate for years, but not in an estate in fee;[3] and that an express covenant in a deed took away all implied covenants.[4] For some of these distinctions, it was said, no very solid reasons could be given. They probably arose from artificial reasons, derived from the feudal law.[5] The civil law implies a covenant as to title with respect to the sale of both real and personal property. By the revised statutes of New-York, it is enacted that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.[6]

The question, whether there is an implied covenant on the part of the lessor of a dwelling house, that the premises are tenantable, was fully considered by the supreme court, in a recent case.[7] It was there held, that there is no implied warranty on the part of a lessor of a dwelling house that it is fit for occupation and tenantable. And the learned judge, in delivering the opinion of the court, said, that the doctrine of implied covenants, or warranty, had a very limited application for any purpose, to a lease for years, and in every case has reference to the *title*, and not to the *quality*, or *condition* of the property. The maxim, *caveat emptor*, applies to the transfer of all property, real, personal and mixed; and the purchaser generally takes the risk of its *quality* and *condition*, unless he protects himself by an express agreement on the subject. A sale of

[1] 8 Scott, N. S. 307. 13 Law Jour. N. S., C. P. 215. 8 Jur. 760.

[2] Frost v. Raymond, 2 Cai. 188, 195. Kent v. Welch, 7 J. R. 258.

[3] 2 Cai. supra.

[4] Vanderkar v. Vanderkar, 11 J. R. 122.

[5] Per Kent, Ch. J. in Frost v. Raymond, 2 Cai. 195.

[6] 1 R. S. 738, § 140.

[7] Cleves v. Willoughby, 7 Hill, 83.

provisions for domestic use, (Van Bracklin v. Fonda, 12 John. R. 468,) and a demise of ready furnished lodgings, (Smith v. Marable, 1 Carr. & Mar. 479,) may be mentioned as exceptions; for as to these the law implies a warranty, that the former are wholesome, and the latter free from nuisance. (See Chitty on Contracts, 449 to 452, 5th Am. ed.) The learned judge then reviewed the cases on this subject, and which are referred to below,[1] and observed that they hardly admitted of classification, and that it would be difficult to deduce from them any clear and satisfactory general principle. And he adopted the remark of Ch. J. Tindal, in Izorn v. Gorton, (5 Bing. N. C. 501,) that the cases in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either *error* or *fraudulent misdescription* of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the *wrongful act* or *default* of the landlord himself. And he concludes that, when there has been no misdescription of the premises, either by mistake or fraud, and no particular agreement to put them in repair, the tenant takes them for better or for worse, and the landlord is under no obligation to repair.

We shall in the next place consider how far the maxim, *caveat emptor*, applies in the case of the sale of goods and chattels, first, in regard to the *quality* of the goods, and secondly, in regard to the *title* to them.

With regard to the *quality* of the article sold, the seller is not bound to answer, unless there be a fraudulent representation, or a fraudulent concealment, or a warranty. On this subject, the rule laid down by Ch. J. Tindal, in a recent case,[2] may be taken as a guide: "If" said the learned judge, "a man purchase goods of a tradesman, without, in any way, relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but if the tradesman be informed, at the time the order is given, of the purpose for which the article is wanted, the buyer, relying upon the seller's judgment, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is re-

[1] Smith v. Marable, 1 C. & M. 479; S. C. 11 M. & W. 5. Salisbury v. Marshall, 4 C. & P. 65. Collins v. Barrow, 1 Mood. & Rob. 112. Shepherd v. Pybus, 3 Man. & Gr. 867. Edwards v. Hetherington, 7 Dowl. & Ryl. 117; S. C., R. & M. 268. Nation v. Tozer, 1 Cr. Mees. & Rose, 172 4 Tyr. 561, S. C.

[2] Brown v. Edgington, 2 Scott's N. P 504; S. C. 2 Man. & Gr. 279, recognized by Parke, B. in Sutton v. Temple, 12 M & W. 64. Jones v. Bright, 5 Bing. 533 recognized, 4 M. & W. 406, per Parke, J

quired." This is quite reasonable, for if the articles furnished are not those which the vendee agreed to purchase, he ought not to be obliged to pay for them. In a case of this kind, the purchaser ought to return the goods to the vendor, or give him notice to take them back, and thereby rescind the contract; or he will be presumed to acquiesce in the quality of the goods.[1]

In the leading case in New-York, it was held, contrary to the rules of the civil law, that a sound price does not imply a warranty of soundness, and, that if there be neither warranty nor fraud, the buyer cannot recover, though the article turns out to be defective, or different from what it was sold for.[2] The court distinctly adopted the reasoning of Fonblanque on this subject.[3] That writer says: "The principles upon which courts of law proceed upon the subject of warranty so strongly tend to reconcile the claims of convenience with the duties of good faith, that I cannot conceive the means by which they can receive an additional extent, or be in any degree circumscribed, without endangering the interests which they are now so well calculated to preserve. To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is necessary to the intercourse of society. These objects are attained by those rules of law, which require the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to those points, where attention would have been sufficient to protect him from surprise, or imposition, the maxim, *caveat emptor*, ought to apply; but even against this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting in good faith, *fides servanda* is the rule of law, and can scarcely be more effectually enforced in equity than it is at law."

The doctrine of Seixas v. Woods has been repeatedly recognized and reaffirmed in the New-York courts.[4]

Nor does the circumstance that the article sold is an entirely spurious and worthless one, fraudulently made for the purpose of being sold for a

[1] Fisher v. Samuda, 1 Camp. N. P. R. 190. Milner v. Tucker, 1 C. & P. 15. Cash v. Giles, 3 id. 407. Percival v. Blake, 2 id. 514.

[2] Seixas v. Woods, 2 Cai. 48.

[3] 1 Fonbl. B. 1, ch. 5, § 8, p. 380.

[4] Swett v. Colgate, 20 J. R. 196. Snell v. Moses, 1 id. 96. Perry v. Aaron, id. 129. Defreeze v. Trumper, id. 274. Holden v. Dakin, 4 id. 421.

valuable commodity, which it is made to resemble, vary the rule as between an innocent vendor and vendee.[1]

The sale of provisions for *domestic use* has already been stated to form an exception to the general rule. With respect to these, the vendor is bound, at his peril, to know whether they are sound and wholesome; and if they are not so, an action on the case will lie against him at the suit of the vendee.[2] But this exception does not embrace provisions sold as *merchandise*, and not for immediate consumption.[3] The articles are, usually, in the former case, sold in large quantities, and neither party is presumed to have an actual knowledge of their condition. Hence, on the sale of a manufactured article, as flour, for a sound price, there is no implied warranty that the article is merchantable.[4] The common law rule prevails in such cases.

The foregoing observations are sufficient to illustrate, in a general way, the maxim of caveat emptor, in regard to the *quality* of the goods sold. It remains to consider the same question in regard to the *title* to them.

The general principle has long been established in New-York, that, on the sale of a chattel, there is an implied warranty of title in the vendor.[5] Whether a warranty shall be implied, when the vendor, at the time of the sale, is *not in the actual possession of the thing sold*, has been decided in the negative by the supreme court of this state, in a recent, well considered case.[6] A warranty, say the court, should only be implied when good faith requires it. The possession of the vendor, at the time of the sale, is equivalent to an affirmation of title, and there is no hardship in implying a warranty in such a case. And the court accordingly held, that an implied warranty of title was only raised when the vendor was in possession of the articles sold, at the time of the sale.

If the property sold be, at the time, in the possession of another person, and there be no affirmation of ownership, no warranty will be implied. Possession out of the vendor is enough to put the purchaser on inquiry, and to call for an express warranty, if he chooses not to take the property upon his own risk. It is believed that, in such a case, the maxim, *caveat emptor*, applies.

There is some conflict in the authorities, as to whether a warranty

[1] Welch v. Carter, 1 Wend. 185. Lambert v. Heath, 15 M. & W. 485.

[2] Van Bracklin v. Fonda, 12 J. R. 468.

[3] Moses v. Mead, 5 Denio, 617; S. C. 1 id. 378.

[4] Hart v. Wright, 17 Wend. 267, affirmed. 18 id. 449.

[5] Defreeze v. Trumper, 1 J. R. 274. Heermance v. Vernoy, 6 J. R. 5. Swett v. Colgate, 20 id. 196. Rew v. Barber, 3 Cowen, 272.

[6] McCoy v. Artcher, 3 Barb. S. C. R. 323.

will be implied in the vendor, who is not in possession at the time of the sale. It is laid down by a writer of high authority, that a warranty will be presumed, whether the goods sold be, at the time of the sale, in the possession of the vendor, or of a third person, unless the contrary be then expressed.[1] Chancellor Kent, in his commentaries,[2] asserts, that the rule *caveat emptor* applies, if the possession be in another at the time of the sale, and there be no covenant, or warranty. He assumes, that the law implies a warranty only in cases when the seller has possession of the article, and sells it as his own, and not as agent for another, and for a fair price.[3] To this extent we have adopted the civil law, which in all cases, on a sale for a round price, implied a warranty of title, and allowed the article, if unfit for the purpose intended, to be returned, and the bargain to be rescinded.[4] In the early New-York cases, the attention of the court was not drawn to the distinction between the sale by a party out of possession, and by a party in possession. This distinction is properly taken in McCoy v. Artcher, (supra,) and is supported by principle and authority. In England, an implied warranty of title is never raised except on a sale by a person in possession.[5] And even, on such sale, it has been denied that the purchaser has any remedy against the vendor, unless there be fraud on the part of the latter, or an assertion of title, or representation amounting to a warranty.[6] But it is admitted that the doctrine has been much restricted in its practical operation, by holding that a simple assertion of title is equivalent to a warranty, and that, generally, any representation may be tantamount thereto, if the party making it appear, from the circumstances under which it was made, to have had an intention to warrant, or to have meant that the representation should be understood as a warranty.[7]

Having thus briefly shown the definition of fraud as it is considered in the eye of a court of equity, whether arising from the assertion of a falsehood, or the suppression of the truth; whether it be actual moral fraud or constructive fraud; and having adverted, briefly, to the doctrine of *caveat emptor*, it may now be convenient to illustrate the subject by a few examples, which have been sustained by authority. In doing this,

[1] W. W. Story on Con. § 535. Id. on Sales, § 367

[2] 2 Kent's Com. 478.

[3] Id.

[4] Domat, Cushing's ed. vol. 1, part 1, tit. 2, § 2, arts. 3 and 4.

[5] Medina v. Stoughton, 1 Salk. R. 210; S. C. 1 Ld. Raym. 323. Grosse v. Gardner, Carth. 90. 1 Shower, 68.

[6] Broom's Legal Maxims, 628.

[7] Id. 684. Peto v. Blades, 5 Taunt. 657. Jones v. Bowden, 4 id. 847. Sprigwell v. Allen, Aleyn's R. 91, and Paget v. Wilkinson, cited 2 East, 448, n. a.

it will not be necessary to separate the cases of fraud arising from *misrepresentation*, from those which arise from fraudulent *concealment*. Both stand upon the same footing, and are followed by the same consequences; and it will tend to avoid repetition, if they are treated under the same head. Cases of fraud between parties standing to each other in confidential relations, and of constructive fraud, will then be noticed, and some of the modes of *preventing* fraud, and of *relieving* against it, will then be brought under review.

It is a well established principle, that equity will relieve, not only against deeds, writings, and solemn assurances, but also against judgments and decrees, obtained by fraud and imposition.[1] Thus, in a case before Chancellor Kent, where an attorney revived, by *scire facias*, an old outstanding judgment, on which but a very small sum, if any thing, was due, knowing that the land on which the judgment was a lien, was in the possession of innocent and *bona fide* purchasers; and afterwards made use of the judgment to compel the purchasers, who were ignorant of the proceedings under the scire facias, to pay and secure to him a debt against the person under whom they had purchased; the court, on the ground of imposition and undue advantage taken by the attorney, ordered him to refund the money he had so obtained, and set aside the security taken by him, with costs.[2]

The same principle was applied in the first circuit in New-York, by the assistant vice chancellor, in setting aside, on an original bill, filed for that purpose, a decree obtained by fraud. The case was, shortly, this: A mortgagee having two mortgages for the same debt, one on the principal debtor's lands, and one on lands of a surety, whose infant heir succeeded thereto; after the debt was satisfied by a conveyance of the former, the mortgagee filed a bill against the infant to foreclose the mortgage on the lands of the latter, in which he claimed the mortgage money to be due, and the infant answered by his guardian *ad litem*; no defense was set up, the usual decree for a foreclosure and sale was made, and the infant's lands were sold under the decree, the mortgagee becoming the purchaser of a portion of the same; it was held that the decree was obtained by fraud, and it was set aside.[3]

But although equity can give relief against a judgment or decree, and even in the case of a judgment after verdict, yet it is a settled principle

[1] Thompson v. Graham, 1 Paige, 384. Apthorpe v. Comstock, Hopk. 143.

[2] Reigal v. Wood, 1 J. Ch. R. 402.

[3] Loomis v. Wheelwright, 3 Sand. Ch. R. 135. Bradick v. Gee, Ambler, 229. Barnsly v. Powell, 1 Ves. 289, 120. Richmond v. Tayleur, 1 P. Wms. 734. Loyd v. Mansell, 2 id. 73.

that it will not do so in the latter case, unless the complaining party can impeach the justice of the verdict by facts, or on grounds of which he could not have availed himself, or was prevented from doing it, by fraud or accident, or by the acts of the other party, unmixed with negligence or fault on his part.[1] The rule on this subject was thus stated by Marshall, Ch. J., in a case in the supreme court of the United States:[2] Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself, or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down, as a general rule, that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be of the opinion that the defense ought to have been sustained at law. These principles were approved by the vice chancellor of the 8th district, and by the chancellor of New-York, on appeal, in a recent case.[3]

When the defendant has attempted his defense at law, and failed for want of proof;[4] when a matter of fact, properly a subject of defense at law, is not litigated at law;[5] and when a party goes to trial at law, and is disappointed in the weight of his evidence, or neglects to move for a new trial, or neglects to except to an improper opinion against him at law,[6] equity will not, in either case, afford relief. In none of these cases is any fraud attributable to the other party, nor do they fall within the principle of accident, or mistake. The failure of the party was rather owing to his want of vigilance, or to that class of misfortunes against which equity does not relieve. There are cases where the court, in which the action is pending, will award a new trial upon terms, when a court of equity would not afford relief by an original action. The remarks of the learned chancellor, in an early case,[7] are extremely appropriate to the present subject: Before courts of law, said the chancellor, were in

[1] Duncan v. Lyon, 3 J. Ch. R. 356.

[2] Marine Ins. Co. v. Hodgson, 7 Cranch, 332.

[3] Patterson v. Bangs, 9 Paige, 630, 634. French v. Gardner, 7 Porter, 549. Mark v. Candiff, 6 id. 24.

[4] Harrison v. Harrison, 1 Litt. 137.

[5] Stone v. Moody, 6 Yerg. 31.

[6] Veech v. Pennebaker, 2 Bibb, 326.

[7] Simpson v. Hart, 1 J. Ch. R. 97, 98. Barker v. Elking, id. 455. Smith v. Lowry id. 320. Lansing v. Eddy, id. 49. Hawley v. Mancius, 7 id. 182 McVickar v. Wolcott, 4 J. R. 510.

the exercise of their present liberal jurisdiction over the subject of new trials, the parties were frequently forced into equity, to be relieved from oppressive verdicts. (3 Bl. Com. 388.) Since, however, that jurisdiction has been well established, and freely exercised, on equitable as well as legal grounds, the party failing in his application at law for a new trial, will not be relieved in equity, upon the merits already discussed, and fully within the discretion of a court of law. Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it than the courts of law, in a similar case, could re-examine a decree of the court of chancery. In the case of Bateman v. Willoe, (1 Schoale & Lef. 201,) we have the opinion and decision of so high and respectable authority as Lord Redesdale, on the subject now under consideration. A verdict was obtained, at law, against the plaintiff, which he considered unjust, and having failed in his application for a new trial, on account of a defective notice of the motion, he sought relief in equity; but the bill was dismissed, and Lord Redesdale said, that he could not find any ground whatever for a court of equity to interfere, because a party had not brought evidence which was in his power at the trial, or because he had neglected to apply, in due time, for a new trial. There are cases, he observed, cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere. So, where a verdict has been obtained by fraud, or where a party has possessed himself, improperly, of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but, without circumstances of that kind, I do not know, says Lord Redesdale, "*that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction.*" Although the case of Simpson v. Hart was reversed by the court of errors, it was upon a ground not impugning the foregoing principles, but they were, on the contrary, expressly approved by Spencer, justice, who delivered the prevailing opinion of that court.[1]

The settled doctrine of the English chancery is, not to relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defense, and the plaintiff knew, of his own knowledge, the fact to be otherwise than as found by the jury.[2] The doctrine of the court of errors, in the early case of Le

[1] Simpson v. Hart, 14 J. R. 77.

[2] Williams v. Lee, 3 Atk. 224.

Guen v. Gouverneur & Kemble,[1] was, that where a party to a suit at law had knowledge of a fraud, or other matter of defense, in time to avail himself of it at the trial at law, and he neglected to do so, he could not afterwards obtain relief in a court of equity against the judgment at law, on the ground of such fraud, or matter of defense, that he might have set up at the trial, but is forever concluded by the judgment. Although relief against a judgment or decree, for fraud, may be obtained in the same court, by motion, or petition, yet it may also be obtained by an original bill, in the nature of a bill of review.[2] Hence, it would seem, that notwithstanding law and equity are administered in this state by the same tribunal, it is not necessary that relief against a judgment, obtained by fraud, should be sought by a motion addressed to the court in which the judgment was obtained, but may be invoked by an original action, in which the relief prayed is to set aside the judgment.

There is no case in which equity has ever undertaken to question the judgment of another court for mere irregularity. The power in such case is always exercised by the court in which the judgment was given, and the relief is frequently granted upon terms. The power in such cases rests in the sound discretion of the court.[3]

The decision of a court on a special motion has not the same conclusive effect as a judgment or decree. Such decisions are frequently made, without much discussion. They cannot be thrown into the shape of a record, and become the subject of review in any other court. In the same court they are not considered so final and decisive as to furnish a bar to another and further discussion of the question. Much less should they be treated as falling within the rule of *res judicata*, and preclude a court of equity from reinvestigating the same matter.[4]

Equity refuses to interfere, where the grounds advanced might have been used as a defense at law, but for the negligence and inattention of the party.[5] If, therefore, at the time of the trial, he had full knowledge of the fraud, or other matter of defense, and neglected to avail himself of it, he is concluded by the judgment.[6] But if it be doubtful whether a court of law can take cognizance of the defense, and there exists no

[1] 1 J. Cas. 456.

[2] Sheldon v. Fortescue, Aland, 3 P. Wms. 111. Munsell v. Morgan, 3 Bro. C. C. 74. Loyd v. Mansell, 2 P. Wms. 73.

[3] Shottenkirk v. Wheeler, 3 J. Ch. R. 280. De Reimer v. De Cantillon, 4 id. 92. French v. Shotwell, 6 id. 235.

[4] Simpson v. Hart, 14 J. R. 76. Arden v. Pattison, 5 J. Ch. R. 52.

[5] Duncan v. Lyon, 3 id. 356. Cowell v. Price, 1 Bibb, 173. Kenny v. Ogden, 2 Green's Ch. R. 168. Reeves v. Hogan, Cooke, 175.

[6] Le Guen v. Gouverneur, 1 J. Cas. 436. Winchester v. Jackson, 3 Hayw 313.

doubt of the jurisdiction of a court of equity; and if, in such a case, a defendant at law, under the influence of such doubt, omits to make his defense, or if he brings it forward and it be overruled, under the idea that it is not a defense at law, a court of equity may afford relief notwithstanding the trial at law.[1] In the case of Bateman v. Willoe,[2] Lord Redesdale said, there may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; as in complicated accounts, when the party has not made defense, because it was impossible for him to do it effectually at law.

An award stands upon the same footing as a judgment, with respect to the power of a court of equity to relieve against it. As was well remarked by Van Vechten, senator, in a leading case, the parties to an arbitrament elect their own judges, and voluntarily clothe them with powers commensurate to a final decision on their rights, unshackled by legal forms and technical rules. Every submission may, therefore, be considered as evincing the intent of the parties to transfer the power of deciding finally upon the matters submitted, from the judicial tribunals to the arbitrators.[3]

The power of the court to set aside an award for mistakes has already been alluded to, and the general subject of awards, in various other aspects, may, perhaps, be noticed hereafter. At present we are to inquire as to the remedy, where the award is obtained by *fraud.*

It seems to be settled, that if an award is obtained by false and fraudulent statements of a party,[4] or by the corruption and partiality of the arbitrators, or by the suppression and concealment of material facts by either of the parties, if the knowledge of those facts would have produced a different result, it is a sufficient ground for setting it aside.[5] In the last mentioned case, the refusal of the arbitrators to hear legal, pertinent and material evidence, was held to be such gross misconduct in the arbitrators, as to afford good cause, upon well established principles of equity, for setting aside the award. The party objecting to the evidence, in such a case, may well be treated as participating in the gross misconduct of the arbitrators. But when there is no charge of corruption, partiality, or undue practice in the arbitrators, an award will not be set aside, however unreasonable or unjust it may be.[6] In this position, it is assumed, that

[1] King v. Baldwin, 17 J. R. 389, per Spencer, Ch. J. Rathbone v. Warren, 10 id. 587.

[2] 1 Sch. & Lefr. 205.

[3] Van Cortland v. Underhill, 17 J. R. 430.

[4] Bulkly v. Starr, 2 Day, 553.

[5] Van Cortland v. Underhill, 17 J. R. 405.

[6] Todd v. Barlow. 2 J. Ch. R. 551.

there was no fraud in the prevailing party, and that the unreasonableness of the award was the mere result of the error in judgment of the arbitrators.

Letters patent for conveying real estate, may be set aside in equity, if the same were obtained by fraud. This was so held in an early case, in 1684,[1] and the same was approved by the supreme court of New-York, in Jackson v. Lawton.[2] In the latter case, two patents had been granted for the same land. The second was, of course, inoperative, until the first was set aside. The court said, that if the first was issued by fraud, or on false suggestion, unless the fraud or mistake appear on the face of the patent, it is not void, but voidable only. And if it be only voidable, it can be avoided only by *scire facias*, or by bill or information, in the court of chancery. In Maryland, say the court, the practice has long been settled to vacate patents by a decree in chancery, founded on a proceeding by bill, or information, or scire facias. (1 H. & M. 23, 92, 165. 2 id. 201, 244.) And in one of the cases it was admitted by the chancellor, (2 id. 141,) that as long as a grant remained unrepealed by chancery, it must prevail at law against a younger grant.

The practice of going behind the patent for lands when granted by the general government, on allegations of fraud in the patentee, in obtaining the patent, and of examining into the equities of other persons entitled or claiming to be entitled to the patent, and setting aside the same if fraudulently obtained, has been long judicially settled in Ohio and Kentucky, and the same practice been pursued by the supreme court of the United States.[3] The relief has in all cases been granted by bill in equity, and Marshall, Ch. J., in one of the cases, while speaking of avoiding a grant for causes existing anterior to its being issued, observes, that there are some things so essential to the validity of the contract, that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal; and in which the means by which an elder title was acquired might be examined. In general, a court of equity appears to be a tribunal better adapted to this object than a court of law. On an ejectment, the pleadings give no notice of these latent defects, of which the party means to avail himself; and, should he be allowed to use them, the holder of the elder grant

[1] Att'y Gen. v. Vernon, 1 Vern. 277.
[2] 10 J. R. 25, 26. Jackson v. Hart, 12 id. 77. 2 Bl. Com. 348.
[3] Brush v. Ware, 15 Pet. 93. Bodly v. Taylor, 5 Cranch, 196. Polk's Lessee v. Wendell, 9 id. 93. 5 Wheat. 293. Miller v. Kerr, 7 id. 1. Hoffnagle v. Anderson, id. 213.

might often be surprised. But in equity the specific points must be brought to view; the various circumstances connected with these points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation; and a decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant. In general, then, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.[1]

In New-York it is enacted, that when it shall be alleged that letters patent were obtained by means of some fraudulent suggestion, or concealment of a material fact, made by the person to whom the same were issued, or made with his consent or knowledge; 2d, when it shall be alleged that such letters patent were issued through mistake, and in ignorance of some material fact; 3d, when the patentee, or those lawfully claiming under him, shall have done or omitted any act, in violation of the terms and conditions upon which such letters patent were granted; or shall, by any other means, have forfeited the interest acquired under the same, a writ of scire facias may be issued out of the supreme court, in behalf of the people, upon the relation of the attorney general, or of any private person, for the purpose of vacating and annulling such letters patent.[2] And this provision is adopted by the code of procedure;[3] and has been acted upon by the attorney general in a recent case.[4] But this proceeding is supposed to be in substance according to the common law,[5] and does not, therefore, exclude a resort to equity to obtain relief.

The contract of insurance has, in some instances, given rise to the exercise of the authority of courts of equity. This contract is either a contract of indemnity against the perils of the sea, if it be a marine insurance;[6] or, if a fire policy, a contract of indemnity against loss by fire;[7]

[1] Polk's Lessees v. Wendell, 9 Cranch, 87, per Marshall, Ch. J., in pp. 291, 292, Cond. Rep.

[2] 2 R. S. 578, § 12.

[3] Code of Procedure, § 433.

[4] The People v. Clark, 10 Barb. 120, affirmed by court of appeals, Dec. term, 1853.

[5] See reviser's note to the section.

[6] 1 Duer on Ins. Lec. 1.

[7] Murdock v. Chenango Mut. Ins. Co. 2 Comst. 210.

or, if an insurance on life, it is a contract of indemnity, depending upon the death of the person whose life is insured. All the writers on the subject agree that it is eminently a contract of good faith, in which the underwriter reposes confidence in the insured, and has a right to exact from him all needful information, not within his own knowledge, that will enable him to determine the nature and character of the risk. It is, accordingly, an established principle, that a misrepresentation to the underwriter, or concealment from him of a material fact affecting the risk, will avoid the policy. The consequences are the same, whether the misrepresentation or concealment be the result of accident, mistake, or fraud. The remarks of Lord Mansfield, in a leading case,[1] contain the principle applicable to this contract. The special facts, upon which the contingent chance is to be computed, says his lordship, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through *mistake*, without any fraudulent intention; yet, still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run, at the time of the agreement. The policy would be equally void, against the underwriter, if the insured concealed; as if, for example, he insured a ship on her voyage, which he privately knew to be arrived; and an action would lie to recover back the premium. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aliud tacere.* The insured need not mention what the underwriter knows, or what he ought to know; or what he takes upon himself the knowledge of; or what he waives being informed of.[2]

Where, in a fire policy, the insured *conceals* a fact, which the insurer has a right to know, the policy is void. As where goods in a store are insured against fire, the condition annexed to the policy requiring a description of the property insured, and "its relative situation as to other

[1] Carter v. Boehm, 3 Bur. 1905. 214, 302. 1 Marsh. on In. 450, 451, 464.

[2] Laidlow v. Organ, 2 Wheat. 178. 1 Broom's Legal Maxims, 382. Arnold on In. 537 to 539. 1 Phil. on In.

buildings, distances from each, if less than ten rods," and the application for the insurance is made a part of the policy, any misstatement in such application, as to the situation of the store, in regard to other buildings, renders the policy void.[1] Here an affirmative statement of the fact would be a warranty. But the assured omitted to give the information which the conditions of the application required, and the learned judge thought such omission a concealment of a fact which the insurer had a right to know; and for that reason the policy was invalid; it being a part of the contract, that any "concealment in the application" should render the insurance void.[2]

In most instances, the question as to the validity of a policy of insurance, and whether it has, or has not, been rendered void by reason of fraud, are cases at law, and in general the remedy at law, in an action upon the policy, is plenary and efficient. But a court of equity can interfere before or after a loss has occurred, and require the policy to be annulled on the ground of fraud. Thus, where a merchant, having a doubtful account of his ship, insured it without acquainting the insurers of the danger the ship was in, the concealment was held to be a fraud, and the policy was ordered to be given up with costs, but the premium was required to be returned.[3] In like manner, an insurance on a life, obtained by fraud, was set aside in equity, with costs, and the premium directed to go as part of the costs.[4] But courts of equity in modern times do not interfere in insurance causes, unless in some extraordinary cases.[5]

The principle, that a court of equity will relieve against contracts fraudulently made, has been applied to instruments under seal, as well as oral contracts. Where the one party is under an obligation to make a disclosure, and the other is entitled to the information which the first conceals, equity will relieve and set aside a conveyance thus fraudulently obtained. Thus, where a devisee, under a will defectively executed, represented the same to be properly attested, and concealed the defect from the heir, who was ignorant thereof, and thus obtained from him a release, the court adjudged the release to be invalid, and set it aside for the fraud. Here was both the *suggestio falsi* and the *suppressio veri*, either of which was a good ground for relief.[6]

[1] Wilson v. Herkimer Co. Mut. In. Co. 2 Seld. 53.

[2] Id. Gates v. Madison Ins. Co. 2 Comst. 48, 51.

[3] De Costa v. Scandret, 2 P. Wms. 170.

[4] Whittingham v. Thornburgh, 2 Vern. 206.

[5] Charleston Insurance Co. v. Potter, 3 Desaus. 6.

[6] Broderick v. Broderick, 1 P. Wms. 139.

The case of Wheeler v. Smith,[1] already cited under the head of mistake, might as appropriately be quoted here. The relation which the parties stood to each other, the confidence which the releasor reposed in the other parties, his necessitous circumstances, the disproportion between the value of the property and the consideration of the release, would have justified a decree, setting the release aside for fraud.

It is the settled doctrine of the courts of equity, that deeds and other instruments fraudulently obtained, and which are attempted to be inequitably set up, may be ordered to be delivered up and canceled, and, if need be, a reconveyance ordered. Where a defendant procured a release, without consideration, from an executor, who had renounced the execution of the will, and had become insolvent; and the release was attempted to be used for the purpose of defeating the claims of the acting executor, who knew nothing of the circumstances, and whom the defendant intended to defraud; it was held to be a proper case for the interposition of a court of equity.[2]

In all cases of fraud, whether by misrepresentation or concealment, if the injured party, with a full knowledge that he has been defrauded by another, settles the matter and releases the party who has defrauded him, he has no longer any legal or equitable claim to relief against such voluntary act.[3] An accord and satisfaction is equally available as a defense, in equity as at law.[4]

SECTION II.

OF TRANSACTIONS BETWEEN PARTIES STANDING IN CONFIDENTIAL RELATIONS TO EACH OTHER, AND OF UNDUE INFLUENCE.

THERE is a large class of cases, relievable in equity, arising from the peculiar relation which the parties occupy with respect to each other, in which confidence is reposed by the one party, and an influence is acquired by the other. A learned judge in the court of appeals of New-York, in a recent case, well remarked, that a court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing

[1] 9 Howard, 55. See ante, p. 65.
[2] Thompson v. Graham, 1 Paige, 384.
[3] Parsons v. Hughs, 9 id. 591.
[4] Strong v. Holmes, 7 Cowen, 224. Bac. Abr. tit. Accord and Satisfaction, A.

in the relation of Parent and Child, Guardian and Ward, Physician and Patient, Solicitor and Client, and in various other relations, in which one party is so situated as to exercise a controlling influence over the will, conduct and interests of another.[1] Under this same head he might have classed, also, the relation of Principal and Agent, Principal and Surety Landlord and Tenant, Ancestor and Heir, Husband and Wife, Trustee and Cestui que Trust, Executors and Administrators, and Creditors, Legatees and Distributees, Appointor and Appointee under powers, and Partners and Part Owners. In these, and the like cases, the law requires the utmost good faith, in order to prevent undue advantage from the unlimited confidence which the relation creates.

Although some of the cases under this branch of the subject will be considered more fully under other heads, and in some the line between actual and constructive fraud cannot be accurately drawn, it will not be improper to pass under review the principle by which the court is governed in interposing its aid, and some illustrations from the adjudged cases.

To make any agreement valid requires the assent of the understanding of the several parties thereto. This implies freedom of action, as well as the exercise of reason, accompanied with deliberation; the mind weighing, as in a balance, the good and evil on either side. Every true consent supposes, 1st, a physical power; 2d, a moral power of consenting; and 3d, a serious and free use of them. Hence, it follows, that persons under duress, idiots, madmen and infants, are in general incapable of making contracts, either from a want of freedom of action, or an ability to judge of their own actions.[2] This disability is not in all cases total, but *sub modo only*.[3] But the persons laboring under it are, at all times, the peculiar objects of the paternal guardianship and protection of a court of equity.

It is upon this principle that courts of equity watch, with extreme jealousy, all contracts made by persons, when there is any ground to suspect imposition, oppression, or undue advantage being taken by one of the parties; or when one trusts to another with a blind and credulous confidence; or when one of the parties, from whom an advantage has been obtained, was in circumstances of extreme necessity and distress. Undue influence can hardly ever obtain its object without some degree of fraud; but the cases show that it may exist without actual moral fraud.

[1] Sears v. Shaffer, 2 Seld. 272, per Gridley, J.; S. C., 1 Barb. S. C. R. 410, 418, opinion of Barculo, J.

[2] Fonbl. Eq. B. 1, ch. 2, §§ 1 and 2.

[3] 2 Bl. Com. 291.

It has a nearer affinity to *duress* than to fraud, and in some cases it may contain a mixture of both.

In describing what undue influence is, it was said by Lord Langdale, on one occasion,[1] that there are transactions in which there is so great an inequality between the contracting parties—so much of habitual exercise of power on the one side, and habitual submission on the other—that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, a court of equity will impute an exercise of undue influence. Such cases have not unfrequently occurred in transactions between parent and child, and sometimes in transactions between persons standing to each other in the relation of solicitor and client.

But other cases do not rest solely on the nature of the transaction, and the fact of habitual, or occasional influence; it is required to show that some advantage was taken, or that there was some fear, some use of threat, or of undue practice, or persuasion.

When undue influence is to be inferred from the nature of the transaction, or when the transaction itself is contrary to the policy of the law, it is the province of the court to determine the point, and the question ought not to be sent to a jury.

In the case he was considering, an issue had been awarded out of chancery, to try whether a deed had been obtained by the attorney from his client by fraud, or undue influence. The jury having found there was no fraud, and that it was obtained by undue influence, a motion was made to set aside the verdict and for a new trial, for the reason that no sufficient evidence appeared to justify the finding of undue influence. The deed was given by the client to his attorney, on account of a bill of costs due from the former to the latter. There was no evidence of the exercise of power by the attorney over his client in the matter, and the transaction was known to the family of the client, several days before the deed was executed. As the testimony is detailed by the master of the rolls, there was nothing existing in the case, but the actual relation of solicitor and client; and that alone, though enough to stimulate inquiry, or awaken suspicion, is not sufficient, *per se*, to invalidate a deed.

The case of solicitor or attorney and client, does not stand upon the same footing, with respect to dealing with each other, as Trustee and his *Cestui que Trust*. The solicitor is under no positive incapacity to purchase from his client. A trustee, as will be shown elsewhere more fully, is

[1] Casborne v. Barsham, 2 Beavan, 76. p. 167, where undue influence is said to be
Means v. Means, 5 Strobh. Law Appeals, something which destroys free agency.

not permitted, from motives of public policy, to purchase the estate of his beneficiary.[1] With respect to an attorney or solicitor, the onus lies on him, when he makes a purchase from his client in the matter with respect to which he is attorney or solicitor, which is impeached, to prove that the transaction was fair. It was said on one occasion by Lord Eldon, that "if the attorney will mix with the character of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that reasonable advice against himself, that he would have given him against a third person.[2] He who bargains in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else.[3]

No doubt the rule does not apply, except the party was attorney *in hac re*.[4] In one case it was said, that he cannot take any thing from his client, for his own benefit pending the suit, but his demand; nor at its close, nor until the relation and influence have ceased.[5]

The influence created by the relation between attorney and client, has been watched by our courts with as much jealousy, as by the English courts. In a recent case before Chancellor Walworth,[6] the principles above stated were fully approved and applied. In that case, the attorney obtained from his client the assignment of a judgment, recovered by himself as attorney, for a consideration so grossly inadequate, (about one tenth of its value,) that the client would not probably have made the assignment, if he had been fully informed of the facts, which his attorney ought to have ascertained and communicated to him. The assignment was set aside, and the attorney was ordered to pay to his client the amount collected on it, deducting the sum paid by him to his client as the consideration of the assignment. In this case, it was said that the relation of attorney and client existing between the parties, rendered it unnecessary to prove actual fraud. The difference between the value of the judgment and the sum paid for the assignment, in connection with that relationship, made it a case of constructive fraud, which relieved the client from the burden of proving that the attorney intentionally deceived him, or made any misrepresentations whatever, in relation to the value of the judgment, or the probability of its collection. If the court was not

[1] Herne v. Meeres, 1 Vern. 465. Ex parte Reynolds, 5 Ves. 707. Ayliff v. Murray, 2 Atk. 59. Green v. Winter, 1 J. Ch. R. 27. Parkist v. Alexander, id. 394. Schiefflin v. Stewart, id. 620. Brown v. Rickets, 4 id. 303.

[2] 6 Ves. 277.

[3] Id.

[4] Edwards v. Meyrik, 2 Hare, 60.

[5] Wood v. Downes, 18 Ves. 127.

[6] Howell v. Ranson, 11 Paige, 598

bound to set aside the sale as a matter of course, upon the application of the client, in such a case, the whole burden of establishing the fairness of the sale, and that it was made upon full and adequate consideration, was at least cast upon the attorney. The attorney, it was said, can never sustain a purchase of this kind, without showing that he communicated with his clients every thing which was necessary to enable them to form a correct judgment of the actual value of the subject of the purchase, and as to the propriety of selling at the price offered.[1]

In a still later case,[2] the chancellor said, the safety of the community requires that a bond and mortgage obtained by a solicitor from his client, upon the subject matter of the suit, pending the litigation, should not be permitted to stand for any purpose whatever. This was going further than is warranted by the adjudged cases in this and other states, and in England, and must be understood with qualifications. The facts are not detailed in the report of the case by Mr. Paige, but it appears, from another part of the opinion, that it was also a case of gross fraud. But in the report of the same case by Mr. Denio, on the appeal to the court of errors,[3] we learn that the bond and mortgage were given by the client and his wife, upon real estate, of which the wife was seised in fee, and in which the client had only a contingent life estate by the curtesy, to the solicitor of the husband, who was conducting an action for the partition of the same property; that the solicitor was insolvent; that the only consideration for the bond and mortgage was the individual bond of the solicitor for the same amount, payable to the husband; and that the business capacity of the husband was of a low order. It was thus a mixed case of fraud and undue influence, arising from the relation of solicitor and client. And Spencer, senator, who delivered the leading opinion in the court of errors, said, that he was not prepared to say that every bond and mortgage taken by an attorney or solicitor from his client, upon the subject matter of the suit, must *necessarily* be void. He looked upon the transaction with no favor, and with a disposition to scrutinize it with the utmost rigor. And he approved of the remarks of Lord Eldon in Gibson v. Joyes, already cited,[4] that if the solicitor was able to manifest that he had given his client all that reasonable advice *against himself* that he would have given him against a third person, perhaps the security might be held valid. The whole burden of proof should be thrown upon the attorney or solicitor; and that he who bargains in a matter of advant-

[1] Howell v. Ranson, 11 Paige, 538.
[2] Ellis v. Minervie, id. 467, 468.
[3] 5 Denio, 640, by the name of Evans v. Ellis.
[4] 6 Ves. 277, 278.

age to himself, with a person placing confidence in him, is bound to show that a reasonable use has been made of the confidence.

Before the adoption of the code of procedure in 1848, the courts of New-York watched with extreme jealousy the dealings between attorney and client, with respect to the matters in litigation. Neither the attorney, solicitor or counsel was permitted to contract with his client, previous to the termination of the suit, for a part of the demand or subject matter of the litigation, as a compensation for his services.[1] And the same principles seem to have been very extensively adopted in this country.[2] The ground of the prohibition was in part the relationship of solicitor and client, and in part its tendency to champerty. But whether tending to champerty or not, any agreement is void as against public policy, which places the interest of the solicitor in conflict with his paramount duty to his client.[3]

The law will not *imply* undue influence, from the mere relationship of attorney and client, in respect of transactions not in litigation. In such cases, to induce the court to interfere, there must be something more shown, either of fraud or imposition; some gross disproportion betweeen the value of the property, and the consideration; some appearance of overbearing influence on the one side, and tame submission on the other.[4]

The principle we have been considering has been applied to agreements between a party to a suit before a single magistrate, before whom attorneys do not generally appear, and an individual who appears as the friend and confidential adviser of the party in such suit.[5]

So far as the New-York cases have been influenced by analogies to the statutes to prevent champerty and maintenance, they may be, in some respects, modified by the code of procedure. By the 303d section of that act, all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and *all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor or counsel, for his compensation, are repealed; and hereafter the measure of such compensation shall be*

[1] Merritt v. Lambert, 10 Paige, 358.

[2] Thurston v. Percival, 1 Pick. 415. Livingston v. Cornell, 2 Mart. Lou. Rep. 281. Key v. Vattier, 1 Ham. R. 132. Rust v. Larue, 4 Litt. R. 411. Caldwell v. Shepherd's Heirs, 6 Mon. R. 389. In re Reakly, 5 Paige, 311. Arden v. Patterson, 5 J. Ch. R. 44. Satterlee v. Frazer, 2 Sandf. S. C. R. 141.

[3] Merritt v. Lambert, 10 Paige, 358; S. C. 2 Denio, 607, affirming same.

[4] Bibb v. Smith, 1 Dana, 582. Wendell v. Van Rensselaer, 1 J. Ch. 350.

[5] Buffalow v. Buffalow, 2 Dev. & Batt. 241. 1 Mad. Ch. 94 to 97, where the older English cases are collected and reviewed.

left to the agreement, express or implied, of the parties. Under the above provisions of the code, the practice of attorneys and counsel to make special bargains with their clients has become necessary, in order to insure a compensation for their services, the taxable costs allowed, being confessedly, in most cases, inadequate for that purpose.[1]

In many cases of undue influence, the consent of the party, from whom an advantage is thus obtained, is to a certain extent coerced. He is not left to that entire freedom of action essential to a correct judgment of his affairs, and he is easily deluded by the blind confidence which he reposes in one standing to him in a confidential relation. The principles upon which courts of equity relieve against securities taken by an attorney from his client, apply to all cases in which confidence is reposed by one party in the other. In Dent v. Bennett,[2] it was held that the court would relieve against an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past services, was to be paid 25,000 pounds, after the death of the latter. In this case there were indeed other elements influencing the judgment, besides the relationship between the parties. The agreement was void at law, as holding out an inducement to the medical adviser to accelerate his patient's death; and there

[1] The revised statutes of New-York forbid attorneys, counsellors and solicitors from buying, or being interested in buying, any bond, bill, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing any suit thereon. 2 R. S. 288, § 71. The 72d section forbids the lending, by any attorney, &c. or the advancing any money, &c. as an inducement to the placing in their hands for collection of any note, bond, &c. &c., and the next section makes the violation of the act a misdemeanor. The taking of any conveyance of any lands or tenements, or of any interest therein, from any person not being in possession thereof, while such lands or tenements shall be the subject of controversy by suit, in any court, knowing the pendency of such suit, and that the grantor was not in possession, &c., is made a misdemeanor. 2 R. S. 691, § 5. By section 6, the buying and selling of pretended rights and title to lands, &c. from a grantor not in possession, are also forbidden, and the violation of the act is made a misdemeanor. But a person not in possession is allowed to mortgage the same, and is also allowed to convey the same to the person in possession. Some of the decisions under the foregoing statutes are the following: Mann v. Fairchild, 14 Barb. 548. Tuttle v. Jackson, 6 Wend. 213. Hall v. Gird, 7 Hill, 586. Baldwin v. Latson, 2 Barb. Ch. R. 307. I am not aware of any reported case, since the adoption of the code, in relation to bargains between attorney and client. How far the positions in the text will be modified by the code is, at present, matter of conjecture.

[2] 7 Simons, 539; S. C. 2 Mylne & Craig, 269.

was an apparently gross disproportion between the value of the services and the sum agreed to be given.

The relation of parent and child is one of mutual confidence; and from the natural and just influence which the former has over the latter, the contracts and conveyances, whereby benefits are secured by children to their parents, should be watched with jealousy. Where a father obtained an absolute conveyance from a daughter, in order to answer one purpose, and afterwards made use of it for another, Lord Hardwicke relieved against it under the head of fraud. And in giving his opinion, he laid stress on the fact that it was a conveyance obtained by a father from his child.[1] The cases do not go the length of declaring a contract between parent and child, *per se*, void, by reason of that relation. They do not infer undue influence or fraud, in a conveyance, because the grantor is a son and the grantee the father. They do not go the length of declaring contracts made between parties standing in that relation void, upon principles of public policy. In the cases where the courts have interfered in the dealings between parent and child, there have been invariably other ingredients, showing undue influence, operating upon the hopes or the fears of the child, and some reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child.

The supreme court of the United States, in a recent case, declined sanctioning the broad principle, that the deed of a child to a parent is, *prima facie*, void. The learned judge who delivered the prevailing opinion said: "It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection; and acting on the presumption, that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child. Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such presumption harmonizes with the moral obligations of a parent to provide for his child; and is founded on the same benign principle that governs cases of purchases made by parents

[1] Young v. Peasley, 2 Atk. 254.

in the name of a child. The *prima facie* presumption is, that it was intended as an advancement to the child, and so not following within the principle of a resulting trust. The natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it."[1]

The existence of undue influence and abused confidence may exist in many cases, when a child obtains from an aged and infirm parent a conveyance of his estate, and when the presumption that it was intended as an advancement is repelled by all the surrounding circumstances. In such cases a court of equity has not hesitated to interpose. A conveyance obtained by children from a father will not be sanctioned by the court, if it appears to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility and partiality for them, and the conveyance was upon an inadequate consideration. Thus, a conveyance, by a father 74 years of age, his wife being nearly 70 years of age, and in delicate health, to his two sons, of real and personal estate worth more than nine thousand dollars, taking from his sons a bond and mortgage to secure his and his wife's maintenance, and an annuity of fifty dollars during their lives, was held to be for a consideration grossly inadequate, it not appearing to be intended as an advancement.[2]

In the case just referred to, it was stated by the learned judge who delivered the opinion, that a contract obtained from one party who was in the power of the other, cannot be sanctioned if confidence has been abused, if there be inadequacy of price, or the inference is plain that advantage has been taken of age and imbecility, and the partiality of a parent has been artfully made use of to strip him of his property, and reduce him to a state of dependence and want. And the general principle already stated was sanctioned, that he who bargains in matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence.

In the foregoing case a number of elements combined to show that the conveyance should be set aside. The dissensions in the family had led to a separation of the wife from the husband. A portion of the children adhered to her, and another portion, the grantees, to him. The latter obtained a controlling influence over the father, and for an inadequate

[1] Jenkins v. Pye 12 Pet. R. 253, 254. [2] Whelan v. Whelan, 3 Cowen, 537.

consideration, and upon unfounded representations, obtained the deed in question. Perhaps neither ground alone would have been sufficient to authorize the court to set aside the conveyance. But in the case where great confidence has been reposed, and an ascendancy has been obtained by one party over another, if a court of equity sees that any acts or tratagems, or any undue means, or the least speck of imposition, or the least *scintella* of fraud entered into the bargain, it will avoid the grant.[1]

Of a character similar in principle to the foregoing, was a recent case in the supreme court of New-York, where the like relief was granted.[2]

But a more stringent rule is applied in the case of what are called catching bargains of young heirs; as where an unconscionable purchase is made from a young heir, in his father's lifetime, by a person other than one standing in *loco parentis.* To that class of persons a court of equity seems to have extended a degree of protection, approaching nearly to an incapacity to bind themselves by any contract.[3] It acts upon the principle, that these persons necessarily contract on unequal terms; and it grants relief upon general principles of mischief to the public, without requiring particular evidence of actual imposition upon them, as they are cases of general concern.[4] The whole duty of making good the bargain from an expectant heir, is upon the vendee.[5] An expectancy, no doubt, may be sold, provided it is fairly sold; but the court, in favor of young heirs, requires the vendee to show it. *Prima facie,* the transaction is invalid.

The real object which the rule professes, being to restrain the anticipation of expectancies, which must, from its very nature, furnish to designing men an opportunity to practice upon the inexperience or passions of a dissipated man; its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment which might otherwise regulate their dealing.[6]

Though inadequacy of consideration between persons standing upon equal footing is, in courts of equity, of no account, unless from its grossness it affords evidence of fraud, yet, in regard to expectant heirs, it becomes a ground for the interposition of the court.[7] And in such case

[1] Whelan v. Whelan, 3 Cowen, 537.

[2] Brice v. Brice, 5 Barb. 533. Sears v. Shafer, 1 Barb. S. C. R. 408; S. C. affirmed on appeal, 2 Seld. 268.

[3] Peacock v. Evans, 16 Ves. 514.

[4] Walmesley v. Booth, 2 Atk. 28. Burney v. Pitt, 2 Vern. 14.

[5] Coles v. Trecothick, 9 Ves. 246. Gowland v. De Faria, 17 Ves. 25.

[6] 1 Fonbl. Eq. B. 1, ch. 2, § 12, note k.

[7] Peacock v. Evans, 16 Ves. 517.

the conveyance is set aside on payment of principal, interest and costs, the defendant being considered as a mortgagee.[1] The plaintiff must do equity by paying what was really lent.[2]

The tendency of the doctrine of the court, in these cases, to render all bargains with such persons very insecure, if not altogether impracticable, seems not to have been considered as operating to prevent its adoption and establishment; but, on the contrary, some judges have avowed that probable consequence, as being to them the recommendation of it.[3]

The ground on which the doctrine rests being that the expectant heir is defenseless, and under the pressure of necessity, and that there is an implied fraud upon the ancestor, who is ignorant of the transaction, it would seem that, if the reason of the rule ceased, the rule itself should cease also. It has accordingly been held, that when an expectant heir, under pecuniary pressure, mortgages his reversionary interest, to obtain an advance of money or credit for a purchase of goods, and the party in present possession of the property so mortgaged stands in *loco parentis* to such heir, and knows and approves of the transaction, the heir has no equity to have it rescinded.

The remarks of Lord Brougham, in a case before him in the English chancery, throw much light upon the subject.[4] "Two propositions," says the chancellor, "I take to be incontestible, as applicable to the doctrines of this court upon the subject of an expectant heir, dealing with his expectancy, and as governing more especially the present question. First, that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the tranasction was known to the father, or other person standing in *loco parentis*—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be, if the father, or

[1] Gowland v. De Faria, 17 Ves. 23.
[2] 1 Fonb. Eq. B. 1, ch. 2, § 13. Peacock v. Evans, 16 Ves. 515.
[3] King v. Hamlet, 2 Myl. & K. 456; S. C. 1 Cooper's Sel. Cas. 281.

person in *loco parentis*, shall be found to have concurred in this adoption of the repudiated contract. Either of these propositions would be decisive of the present question, if they were well founded in law, and if the facts allow of their application to it. . . . . .

"The whole doctrine, with respect to an expectant heir, assumes that the one party is defenseless, and exposed unprotected to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered; and then only stand forward to aid him in rescinding engagements which he had allowed him to make and to profit by. If all the cases be examined, from the time of Lord Nottingham downwards, no trace will be found, in any one of them, of the father's or other ancestor's privity; on the contrary whenever the subject is touched upon, his ignorance is assumed, as part of the case; and its being so seldom mentioned either way, shows clearly that the privity of the father, or ancestor, never was contemplated. It is, however, several times adverted to in a manner demonstrative of the principle. In Cole v. Gibbon, (3 P. Wms. 290,) the ground of this whole equity is said to be the policy of the law to prevent the heir being seduced from a dependence upon the ancestor, who probably would have relieved him. In the same spirit, Lord Cowper, in Twistleton v. Griffith, (1 P. Wm. 310,) had before stated, as one effect of the law, its tendency, by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So in the Earl of Chesterfield v. Janssen, (1 Atk. 339,) Mr. Justice Burnett treats such transactions as things done behind the father's back, and, as it were, a fraud upon him; a view of the subject also adopted by Lord Hardwicke, in the same case, (1 Id. 353, 354.) It is as well to mention these cases, because there has been no decision upon the point; but it is quite a clear one, and only new because the facts never afforded a case for decision, the proposition apparently never having been questioned."[1]

On the same principle, a *post obit* bond, given by an expectant heir, has been relieved against. A *post obit* bond is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not con-

[1] King v. Hamlet, 2 Myl. & K. 456; S. C. 1 Cooper's Sel. Cas. 281.

sidered as a nullity; but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the obligor to induce him to make the contract, he is relieved as against an unconscionable bargain, on payment of the principal and interest.[1]

These bonds do not conflict with the statute against usury;[2] nor are they a fraud upon the obligor. They operate as a fraud upon the ancestor, disappointing his intentions; they are against public policy; for they are productive of prodigality on the one hand, and beget extortion on the other; want and avarice always generating one another.[3]

The general policy of the law is, to require the party who deals with expectant heirs and reversioners to prove that he paid a fair price, and, otherwise, to undo the bargain and compel a reconveyance. These same principles apply to *post obit bonds*. The burden of showing the fairness of the transaction, is cast upon the party who seeks to enforce them; and in the absence of such proof, the security will be relieved against. But yet, as it is not absolutely void, but voidable merely, the court does not relieve except upon the terms of doing equity.[4]

It has, however, been decided that a sale of a reversion, at *public auction*, does not fall within the rule, and that the purchaser was not bound to show, in the first instance, the fairness of the sale. There being no treaty between vendor and purchaser in such case, there can be no opportunity for fraud, or imposition, on the part of the purchaser.[5] The sale by auction, it was said, was evidence of the market price, and the vendor is, in such case, in no sense in the power of the purchaser. But the sale of *post obit* bonds at auction, when they were put up for sale without reserve, will be relieved against. The selling such bonds without reserve by a young man, desirous of raising a large sum upon them, payable at the death of his father, was notice to all that the vendor was a young man in distress; that he was so much pressed for money, that he undertook, with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller, at an auction, protects himself against an inadequate price; and it was thought that such vendor was, in some sense, in the power of those dealing with him, and the sale by auction did not, under the circumstances, afford fair evidence of the market price.[6]

If such bonds were absolutely void at law, they could not be rendered

[1] Boynton v. Hubbard, 7 Mass. 119.

[2] Wharton v. May, 5 Ves. 27. Earl of Chesterfield v. Janssen, 1 Atk. 351.

[3] Id.

[4] 1 Fonb. Eq. B. 1, ch. 2, § 13.

[5] Shelly v. Nash, 3 Mad. Ch. R. 236.

[6] Fox v. Wright, 6 Mad. Ch. R. 111.

valid by any new agreement. But being voidable merely, the party, after the contemplated event has happened, and the pressure of necessity has been removed, may confirm the precedent contract.[1] A deed founded in actual and positive fraud, as being made under the influence of corrupt motives, and with an intention to cheat creditors, may be considered void, *ab initio*, and never to have had any lawful existence. The grantee in the deed may be considered as *particeps criminis*, and is not permitted to deduce any right from an act founded in actual fraud. But this rule is not applied to contracts which are only considered fraudulent by construction of law, as being against the policy or provisions of particular statutes.[2] Such contracts can be affirmed by the parties, unless the statute declares them to be void. A deed fraudulent and void as against others, may good between the parties to it.[3]

The position that such bonds can, under any circumstances, be confirmed, has been doubted, on the authority of some cases in New-York and Virginia. But, in those cases, the contract sought to be confirmed was absolutely void between the parties, and not merely voidable. It was void not merely as against public policy, but declared so by statute.[4]

The relationship of guardian and ward gives rise to the application of principles similar to those we have been considering. As infants are peculiarly entitled to the favor of the court, their dealings with their guardian should be watched with jealousy. In New-York, Chancellor Walworth said, in one case,[5] that it was not the practice of the court to discharge the guardian absolutely, and to order his bond to be given up immediately upon the infant's arriving of age, although he had settled with the guardian. That the ward, notwithstanding such settlement, was entitled to a reasonable time, after he became of age, to investigate the accounts of the guardian, and to surcharge and falsify the same, if, upon such investigation, he found any thing wrong. That by the practice of the court of chancery, he was usually allowed one year for that purpose, after he became of age, before the guardian's bond would be canceled, and the guardian absolutely discharged from his trust. That when the application to the court was made after the expiration of the year, the

[1] Earl of Chesterfield v. Janssen, 1 Atk. 354. 1 Fonb. Eq. B. 1, ch. 2, § 13, note r.

[2] Per Thompson, Ch. J. in Murray v. Riggs, 15 J. R. 586. Sands v. Codwise, 4 id. 598, 599, per Kent, Ch. J. Sterry v. Arden, 1 J. Ch. R. 271.

[3] Jackson v. Caldwell, 1 Cowen, 622.

[4] Hoomes v. Smock, 1 Wash. Rep. 392. Payne v. Eden, 3 Cai. 217. Yeoman v. Chatterton, 9 J. R. 297. Wiggins v. Bush, 12 id. 309. 1 Fonb. Eq. B. 1, ch. 2, § 14, No. 11.

[5] In matter of Horne, 7 Paige, 46.

bond would be delivered up and canceled immediately, upon the production of the receipt or discharge of the ward, duly proved or acknowledged But if the application was made within the year, the order would only direct the guardian to be discharged, and that the bond be delivered up and canceled at the expiration of the year; unless the infant, before that time, obtained an order to the contrary, or filed with the officer with whom the bond was deposited a caveat, or notice not to deliver up, or cancel the bond without the further order of the court. These regulations are obviously dictated by an anxious regard to the rights and interests of the ward.

In an earlier case, before Chancellor Kent,[1] the release given by the ward six months after arriving at age, which release was fully and fairly made, and without any fraud, misrepresentation or undue means to obtain it, was held to be valid. But the case also shows the protecting agency of the court over the rights of the ward. Three guardians had been appointed by the surrogate of New-York for the infant, one of whom died soon after, and the other two acted. The ward, six months after arriving at age as before stated, released one of the said guardians, and in the same instrument reserved her claims against the other one, who had been the acting guardian, and against whom her accounts were unsettled. On a bill filed for an account against the guardian not intended to be discharged, the release was plead in bar; but the court held, that though at law the release of one of two or more obligors to a joint and several bond be a release of all, yet, in equity, the release should be construed according to the intent of the parties. It was therefore held to be operative only in favor of the guardian intended to be released, and his surety, leaving the bond in full force against the remaining guardian and his surety.

Lord Eldon, in one case, said, that a guardian cannot take any thing from his ward pending the guardianship, or at the close of it, or at any period, until his influence has ceased to exist.[2] In this case he refers, with approbation, to Hylton v. Hylton, (2 Ves. 547,) where Lord Hardwicke stated the general principles on the subject, and said: "Where a man acts as guardian, or trustee, in nature of a guardian, for an infant, the court is extremely watchful to prevent that person taking any advantage immediately upon his ward coming of age, and at the time of settling accounts or delivering up the trust; because an undue advantage may be taken. It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such an

[1] Kirby v Taylor, 6 J. Ch. R. 242. [2] Wood v. Downes, 18 Ves. 126.

advantage; and, therefore, the principles of the court is of the same nature with relief in this court, on the head of public utility; as in bonds obtained from young heirs; and rewards given to an attorney. pending a cause, and marriage brokage bonds. All depends upon public utility; and, therefore, the court will not suffer it, though perhaps, in a particular instance, there may not be an actual unfairness." And he further added: "The rule of the court as to guardians is extremely strict, and, in some cases, does infer some hardship, as where there has been a great deal of trouble, and he has acted fairly and honestly, and yet he shall have no allowance."[1]

The rule of the common law which withholds from trustees, guardians, &c., a compensation for their "care and pains," in executing the trust, and merely allows them their "costs, charges and all just allowances," was formerly the rule of this state.[2] Where a trustee had fairly expended money by reasonably taking opinions, and procuring directions necessary to the due execution of the trust, he was held to be entitled to such charges, under the head of just allowances.[3] Lord Talbot declared the reason of the rule for refusing an allowance to a trustee, for care and trouble, viz. that under that pretext, the trust estate might be loaded and rendered of little value; and also because of the great difficulty there might be in settling and adjusting the *quantum* of such allowance, as one man's time might be more valuable than that of another, and that the rule was no hardship upon the trustee, since the acceptance of the trust was of his own choice.[4] And Lord Hardwicke, on one occasion,[5] said that the court, in general, looked upon trusts as honorary, and a burden upon the honor and conscience of the person entrusted, and not undertaken upon mercenary views; and he thought there was a strong reason, too, against allowing any thing beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a cestui qui trust, and therefore the court always held a strict hand upon trustees in this particular. At the same time he said, that if a trustee comes in a fair and open manner, and tells the *cestui qui trust* that he will not act in such a troublesome and burdensome office, unless the *cestui qui trust* will give him a further compensation, over and above the terms of the trust, and it is contracted for between them, he would not say that the court would set it aside, though there is no instance where they have

[1] Hylten v. Hylten, 2 Ves. 548, 549. Hamilton v. Mohun, 1 P. Wms. 120.

[2] Green v. Winter, 1 J. Ch. R. 27; S. P., Maning v. Maning, id. 527.

[3] Fearn v. Young, 10 Ves. 184.

[4] Robinson v. Pitt, 3 P. Wms. 249.

[5] Ayliff v. Murray, 2 Atk. 60.

confirmed such bargain. The foregoing principles were all approved by Chancellor Kent in an early case,[1] and he evidently thought it was competent for the trustee to stipulate in advance, with the cestui qui trust, for a compensation.

The strictness and severity of the common law rule in this respect, led the legislature in 1817 to relax it, so far as to make it lawful for the chancellor, in the settlement of the accounts of guardians, executors and administrators, on petition or otherwise, to make a reasonable allowance to them for their services as guardians, &c., over and above their expenses; and when the rate of such allowance should have been settled by the chancellor, it should be conformed to in all cases of the settlement of such accounts.[2]

At common law the court watched with great jealousy the dealings between the guardian and ward, on the termination of that relationship. This did not arise from the supposed immorality of a gratuity from the ward to a faithful guardian. Such gratuity might spring from the generous impulse of a grateful heart, creditable alike to the giver and receiver. But the mind of the ward might be misled by undue kindness, or forced by oppression to make the gift. Whether it was granted under either of these influences, or was an act of rational consideration, could never be fully known to the court. To allow such gifts to stand, would increase the difficulty of getting property from the hands of the guardian.

[1] Green v. Winter, 1 J. Ch. R. 38, 39.

[2] 40th Sess. ch. 251, L. of 1817, p. 292. In pursuance of this law, Chancellor Kent, on the 16th October, 1817, made an order, fixing the compensation to guardians, executors and administrators, in the settlement of their accounts, at five per cent on all sums not exceeding one thousand dollars, for receiving and paying out the same; two and a half per cent on any excess between one and five thousand dollars, and one per cent for all above one thousand dollars. 3 J. Ch. R. 630, 631. On the revision of the laws in 1830, the substance of the order of Chancellor Kent was enacted and made part of the statute relative to executors, administrators and guardians. 2 R. S. 93, § 58. Id. 153, § 22. In McWhorter v. Benson, Hopkins, 28, Chancellor Sandford reviewed the former practice, and vindicated the policy of a fixed and reasonable rate of compensation. Without referring to a single reported case, the chancellor gave an elaborate review of all the adjudged cases in England on this subject. Chancellor Kent, in Ex parte Roberts, 3 J. Ch. R. 43, made the like allowance to the committee of the estate of lunatics, as the law had authorized to be made to executors, &c. And in Meacham v. Sternes, 9 Paige, 401, Chancellor Walworth decided that other trustees, when no provision for a compensation was made in the instrument under which they were appointed, fell within the equity of the same rule.

Under the rule, as it was settled by the courts, there was no inducemen to withhold a settlement, in order to extort a gratuity [1]

The provisions of the New-York statute have removed some of the temptations to abuses which before existed. A reasonable compensation for services, at a fixed rate, leaves no apology for seeking a gratuity.

Upon the same principles we have been considering, it is a rule of equity, that a trustee shall gain no benefit by any act done by him as trustee, but such benefit shall accrue to his cestui que trust or beneficiary.[2] The doctrine of trusts will be treated under its appropriate head. At present it is sufficient merely to say, that a trust, in its simplest elements, is a confidence reposed in one person, who is termed the trustee, for the benefit of another, who is called the cestui que trust; and it is a confidence respecting property, which is thus held by the former, for the benefit of the latter. Out of this confidence arise two *estates* in the property which is the subject of it; a *legal* estate in the *trustee*, which consists in *obligation*, and an equitable estate in the *cestui que trust*, which consists in *right*, and beneficial *enjoyment*. This is a sufficient definition of the terms for the present purpose, while we are merely considering the manner in which the court treats a purchase of the trust property by the trustee.[3]

The rule is well settled, that if a trustee, acting for others, sells an estate and becomes himself interested in the purchase, the *cestui que trust* is entitled to come into equity, as of course, and set aside that purchase, and have the property re-exposed to sale.[4] The sale in such case is not void at law, and the legal estate passes to the purchaser; but he takes it subject to its being set aside in equity on the application of the beneficiary, if made within reasonable time. The beneficiary thus has his election in all cases, either to acquiesce in the sale, and thus affirm it, or have it set aside and a resale ordered.[5] And it makes no differ-

[1] Hatch v. Hatch, 9 Ves. 297.

[2] Holt v. Holt, 1 Ch. Cas. 191.

[3] The definition above given is from Burrell's Law Dict. tit. Trust. Judge Story proposes to substitute for the term *cestui que trust*, the English word *beneficiary*. I see no objection to the change, provided we understand by the latter term, "the person for whose benefit the trust is created." It is worthy of observation, that the words *cestui que trust* are not used in the statute concerning uses and trusts. 1 R. S. 727–731. But the plain English is used as above. (Id. § 60.) If the word "beneficiary" could be substituted for the barbarous phrase, *cestui que trust*, or for its definition, in nine words, as given above from the 60th section, it would be an improvement.

[4] Davoe v. Fanning, 2 J. Ch. R. 257.

[5] Id. and Jackson v. Walsh, 14 J. R. 407. Bergen v. Bennett, 1 Caines' Cas. in Er. 1.

ence in the application of the rule, that the sale was at public auction *bona fide* and for a fair price.[1]

The reason why a trustee cannot in general purchase the trust property, either from the trustee or at public sale, is, that his interest interferes with his duty. *Emptor emit quam minimo potest: venditor vendit quam maximo potest.*[2] The policy of the rule is to shut the door against temptation. It thus operates as a preventive of frauds. Nor is it necessary, in order to invalidate such purchases, to show that the trustee has made any advantage in the article purchased. The reason is, that it would not be safe, with reference to the administration of justice in the general affairs of trusts, that a trustee should be permitted to purchase; for human infirmity will, in very few instances, permit a man to exert against himself that providence, which a vendor ought to exert, in order to sell to the best advantage; and which a purchaser is at liberty to exert for himself, in order to puchase at the lowest price.[3]

A trustee may, indeed, buy from the beneficiary, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances, that the *beneficiary* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee.[4]

If it be for the interest of the beneficiary that the trustee should become the purchaser, and the former is an infant, the court can, on a proper application, allow the trustee to become the purchaser, upon offering to give more than any other person.[5] In that way, the court divests him of the character of trustee, and prevents all the consequences of his acting both for himself and for the cestui que trust.[6] If the trustee has a personal interest in the sale, which may be sacrificed if he is not permitted to bid, the court will appoint a master, or another trustee in his place, to make the sale.[7] But, even in those cases, the court must be satisfied the interest of the *cestui que trust* will not suffer in consequence of such permission. If the trustee, in virtue of his trust, possesses superior advantages of information as to the situation and value of the property.

[1] Hendricks v. Robertson, 2 J. Ch. C. 311.

[2] Davoe v. Fanning, 2 J. Ch. R. 256. Fox v. McKreth, White's Leading Equity Cas. 72, and notes. 49 vol. Law Lib. 105, 144, where the cases are collected and reviewed.

[3] Ex parte Bennett, 10 Ves. 394.

[4] Ex parte Bennett, 10 Ves. 394. Coles v. Trecothick, 9 Vesey, 246. Stuart v. Kissam, 2 Barb. S. C. R. 493.

[5] Campbell v. Walker, 5 Ves. 681, 682.

[6] Id. and Davoe v. Fanning, 2 J. Ch. R. 261.

[7] De Caters v. Le Ray Chaumont, 3 Paige, 178.

so that he will not come to the sale on terms of equality with other bidders, the court will not put him in a situation which may make it for his interest to keep that information to himself.[1]

On the principle that a trustee is not permitted to derive any benefit from his position at the expense of the cestui que trust, a trustee of a junior mortgage cannot buy in the premises for his own benefit, on the foreclosure of a prior mortgage, to the prejudice of the subsequent mortgage which he holds in trust for others. His duty in such case is in conflict with his interest. In cases of this kind, says Chancellor Walworth, the court does not suffer itself to be drawn aside from the application of the equitable rule, by any attempt on the part of the purchaser, to establish the fairness of the purchase. The rule is founded on the danger of imposition, and the presumption of the existence of fraud which is inaccessible to the eye of the court.[2]

On the same priciple, a trustee who buys in an outstanding incumbrance against the trust estate, is only entitled to hold such incumbrance as a security for the amount actually paid by him therefor, with interest.[3]

As the trustee cannot lawfully become a purchaser of the trust property under a prior incumbrance for his own benefit, and to the prejudice of the beneficiaries, without their consent, so, if he does so purchase, at a price below the real value of the property, he will be treated as making the purchase for the use and benefit of his cestui que trust.[4]

Trustees cannot deal in their own behalf, with the funds intrusted to their charge for the benefit of another. Accordingly, where trustees and executors invested a legacy in bank stock, which was in whole or in part the individual property of one of the trustees, and a loss was sustained in consequence of a depression of the stock, they were held accountable for the loss.[5]

The rules we have been considering are firmly established in the English[6] and American jurisprudence.[7] In addition to the cases al-

[1] De Caters v. La Chaumont, 3 Paige, 180.

[2] Van Epps v. Van Epps, 9 Paige, 241, 242.

[3] Quackenbush v. Leonard, 9 Paige, 334.

[4] Slade v. Van Vechten, 11 Paige, 21.

[5] Ackerman v. Emott, 4 Barb. 626.

[6] Holt v. Holt, 1 Ch. Cas. 601. Whelpdale v. Cookson, 5 Ves. 682. Sanderson v. Walker, 13 id. 601. Morse v. Royal, 12 Ves. 355.

[7] Mills v. Goodsell, 5 Conn. 475. Green v. Winter, 1 J. Ch. R. 27. Parkhist v. Alexander, id. 394. Holdredge v. Gillespie, 2 J. Ch. R. 30. Hart v. Ten Eyck, 4 id. 104. Vanhorne v. Fonda, 5 id. 409. Evertson v. Tappan, id. 514. Michoud v. Girod, 4 How 555. Prevost v. Gratz, 6 Wheat. 481. Oliver v. Platt, 3 How. 333. Fox v. Mackreth, White's Leading Cas. in Eq. and the American notes; and see post, under Trusts, where the same subject is treated under a different aspect.

ready cited, those referred to below establish and illustrate the same principles.

The doctrine we have been considering is applicable to executors and administrators, who are not permitted to purchase up the debts of the deceased on their own account; but, in this and most other respects, stand on the footing of other trustees.

In like manner it applies to the relation of landlord and tenant, principal and agent, principal and surety, partner and partner, and various others, where mutual agencies, rights and duties are created between the parties, either by their own acts, or by operation of law.

In the case of principal and agent, the principal contracts for the skill and judgment of the agent, and he has a right to expect from him the utmost fidelity. The habitual confidence reposed in the latter, imparts to his acts and statements a controlling influence over the conduct of the former. Hence, the law watches with jealousy the dealings of the agent, and does not permit him, when his duty requires him to act for the principal, to act for his own exclusive benefit.

Upon this principle an agent, employed to sell, cannot make himself the purchaser; nor if employed to purchase, can he be himself the seller.[1] The rule of equity which prohibits purchases by parties placed in a situation of trust and confidence, with reference to the subject of purchase, is not confined to trustees, or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees or solicitors. But it is a rule which applies universally to all who come within the principle; which principle is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, when he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account, and for his individual use.[2] And a sub-agent is just as much disqualified as an agent is to make a purchase in opposition to the rights and interests of his principal.[3] And when an agent, employed to purchase an estate, becomes the purchaser for himself, a court of equity will treat him as a trustee for his principal.[4] On the same ground, an agent is precluded from taking the benefit of purchasing a debt which his principal was liable to discharge. If employed to

[1] Lowther v. Lowther, 13 Ves. 103.

[2] Per Walworth, Ch. in Van Epps v. Van Epps, 9 Paige, 241. Hawley v. Cramer, 4 Cowen, 717. Brice v. Brice, 5 Barb. 533.

[3] Story, J., Baker v. Whiting, 1 Story's R. 241.

[4] Lees v. Nuttall, 1 R. & Myl. 47.

settle the debt on behalf of his employer, his duty is to settle it upon the best terms he can obtain. If he is able to procure a settlement of the debt for any thing less than the whole amount, it would be a violation of his duty to his employer, or, at least, would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. The same duty devolves on a surety who compounds a debt for which his principal and himself have become jointly liable, and takes an assignment thereof, to a trustee, for himself; he can only claim against his principal the amount which he has actually paid.[1] And so an agent, who discovers a defect in the title of his principal to land, cannot misuse it to acquire a title for himself; and if he does, he will be held as a trustee, holding for his principal.[2]

If a trustee or an agent undertakes to purchase of the owner an estate, or stocks, or debts, with the condition of which he may be well acquainted, and of which the owner is entirely or partially ignorant, there is no doubt a sufficient disclosure should be made to enable the owner to judge of the adequacy of the offer made. If there is any thing misrepresented or concealed, or withheld without a design to conceal, the bargain will be void.[3] This rests upon the fiduciary relation between the parties, by which the agent is bound to make a full disclosure, [illegible][3] from the confidence which the principal reposes in his agent.

The relation which principal and surety bear to each other is, in some respects, analogous to that of partners, and the two cases may be appropriately treated together. It results from the nature of partnership that each partner, during the continuance of the partnership, is agent for his copartners, in all matters pertaining to their joint business, but, at the dissolution of the partnership, this agency ceases with respect to new transactions, and exists only for the legitimate purposes connected with the winding up of the concern.[4] Hence the signature of one partner, in matters of simple contract, relating to the partnership, binds the firm.[5] One partner may release a debt due to the firm, or create a debt against it.[6] A release to one discharges the debt against both.[7] Pay-

[1] Reed v. Norris, 2 Myl. & Craig, 362, 374.

[2] Ringo v. Binns, 10 Pet. 269.

[3] Per Parke, Ch. J., Farnam v. Brooks, 9 Pick. 233.

[4] Collyer on Part. 234–239, 62. Gow on Part. 42.

[5] Carvick v. Vickery, Doug. 653. Whitcomb v. Whiting, id. 652.

[6] Per Lord Kenyon, in Perry v. Jackson, 4 D. & E. 519.

[7] Bac. Abr. Obligation. Reed v. McNaughton, 15 Barb. 177.

ment to one is payment to the firm.[1] Notice to one is notice to all, and notice from one is notice from all. It is, on this principle of agency, that an acknowledgment of a debt, by one partner, during the continuance of the firm, was held to revive it, if outlawed, against the firm, and a partial payment either of interest or principal, made by one partner, to continue the obligation against the company. The same principle applies in the case of principal and surety that governs in the case of partners. Each was treated as an agent for his companion to make payments, and the effect of a partial payment was to revive the debt for the balance.[2] The death of one of the partners revokes the agency, and terminates the privity existing between the parties.[3]

Joint debtors are, with respect to the transaction in which they are united, treated as partners, and subject to all the consequences of that relation.[4] With respect to payment by one, or a release or notice to one of several joint debtors, the effect is the same as if they were partners.

[1] Duff v. East India Co. 15 Ves. 213.

[2] Collyer on Part. 233, and notes. A discussion of the statute of limitations does not belong to this subject The leading cases on the effect of a partial payment will be found discussed in Reid v. McNaughton, 15 Barb. 168 et seq. Bell v. Morrison, 1 Pet. 351. Van Keuren v. Parmelee, 2 Comst. 527. And most of the cases are collected and reviewed in Angell on Limitations, ch. 23, p. 270 et seq. It is believed that the weight of authority, in England and in New-York, till quite recently, sustains the position, that each partner and joint debtor is an agent for his companion, to make payment. The code of procedure, while it enacts that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of the statute of limitations, unless the same be contained in some writing, signed by the party to be charged thereby, expressly leaves the effect of a partial payment of principal or interest as at common law. Code of Procedure, § 110. See also 1 Smith's Leading Cases, 531; note to Whitcomb v. Whiting, Dong. 652. This latter is the leading case on the subject of one debtor being a *quasi* agent for his co-debtor, which is approved in Reid v. McNaughton, supra, and Lane v. Doty, 4 Barb. 530. The recent decision of the court of appeals, in Shoemaker v. Benedict, 1 Kernan, 176, has carried out the reasoning of the judge who delivered the opinion of that court, in Van Keuran v. Parmelee, to its consequences. It is now held in this state, that payments made by one of the joint and several makers of a note, and indorsed upon it, before an action upon it is barred by the statute of limitations, and within six years before suit brought, do not affect the defense of the statutes as to the others. It seems then, that in this state, there is no mutual agency between joint debtors, which will authorize one to act for and bind the others in a manner to vary or extend their liability. It is believed that the foregoing decision, in Shoemaker v. Benedict, took the profession in this state by surprise.

[3] Lane v. Doty, 4 Barb. 530. Atkins v. Tredgold, 2 B. & C. 23. Slater v. Lawson, 1 B. & Ad. 396.

[4] Reid v. McNaughton, 15 Barb. 178.

Each joint debtor is a principal for the payment of the portion of the debt belonging to him to discharge, and is a surety for his companions, that they shall pay their shares. By the death of one of several joint debtors, the remedy of the creditor, at law, survives against the survivor, and he alone can be sued and be compelled to pay the whole debt. On such payment the personal representatives of the deceased are bound to contribute their proportionate share.[1] But every joint loan, whether contracted in relation to mercantile transactions or not, is, in equity, to be deemed joint and several. Therefore, according to the English doctrine, upon the death of one of several joint contractors, or obligors, the creditors have a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors or obligors, or showing that the latter were unable to pay by reason of their insolvency,[2] though the latter are necessary parties. The reason of this doctrine was thus expounded by the master of the rolls, in the last mentioned case of Wilkinson v. Henderson: "All the authorities establish that, in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the question, whether the assets of the deceased might be first resorted to, seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and, that the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner, before he seeks satisfaction from the assets of the deceased partner. It is admitted that if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question then is, whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if any thing, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner; that no additional charge is thrown on the assets of

[1] Hammerly v. Lambert, 2 J. Ch. R. 209.

[2] Thorpe v. Jackson, Younge & C. 553. Wilkinson v. Henderson, 1 Myl. & K. 582

the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and further, that according to the two decisions in Sleech's case, and in the case of Devaynes v. Noble, the creditor was permitted to charge the separate estate of the deceased partner, which in equity was primarily liable, as between the partners, without first having resort to dividends, which might be obtained by proof under the commission against the surviving partner, I am of opinion that the plaintiff is entitled in this case to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of the deceased partner."

This doctrine is not confined to partnerships or to mercantile cases. It is equally applicable to all joint debts; for the debt will be treated in equity as joint and several. And in case any of the debtors die, relief will be granted in equity out of his assets, without claiming any relief against the surviving joint debtors, or showing that they are unable to pay by reason of their insolvency.[1]

The rule is different in this state, as will be shown more at large under the head of Partnership. We have followed the earlier English cases in the times of Lord Hardwicke, and declined to follow the more recent decisions in England. With us, the personal representatives of the deceased joint debtor cannot be reached without alleging and showing the insolvency of the surviving debtor.[2]

The same good faith must be used by joint debtors towards each other, as is required in case of principal and surety, and principal and agent; and the cases applicable to the one relation, have an appropriate bearing on the other. The doctrine we have considered in relation to agency, is applicable also to joint debtors. Good faith and ingenuous dealings is exacted from all who hold either of the relations above mentioned.[3]

All that has been said in relation to partners is equally applicable to part owners of vessels. Each part owner is under the same obligation of good faith towards his companion, that the agent is to his principal, and as one partner is to his associates. It is a relation in which the same confidence is reposed, as in those we have been considering.

[1] Thorpe v. Jackson, 2 Y. & C. 553. Sleech's case, 1 Meriv. 539. Wilkinson v. Henderson, 1 Myl. & K. 582. Devayne v. Noble, 2 Russ. & Myl. 495.

[2] Hammersly v. Lambert, 2 J. Ch. R. 508. Wilder v. Keeler, 3 Paige, 162. Brown v. Story, 2 id. 594. Butts v. Genung, 5 id. 254. Payne v. Mathewson, 6 id. 19. Lawrence v. The Trustees of Leake's Orphans, 2 Denio, 577. 11 Paige, 80. Smith v. Ballantine, 10 id. 101. Jenkins v. Groot, 1 Cai. C. E. 121.

[3] Dob. v. Halsey, 16 J. R. 34. Post v. Kimberly, 9 id. 489, per Thompson, J.

The class of cases to which our attention has been directed, in which the dealings of parties standing in a confidential relation to each other are called in question, are often treated as falling under the head of constructive fraud; and probably, in most instances, they are properly so denominated. The rule of equity which requires, in most of these cases, that the burden of proving the fairness of the transaction should be cast upon the party seeking to enforce an advantage he had acquired from one holding such relation to him as to excite the jealousy of the court, is sometimes treated as a rule devised to *prevent* fraud. But in nearly all the cases under these heads, which have formed the subject of judicial examination, some other ingredient, besides the mere confidential relation of the parties, such as undue influence, concealments, misrepresentations, inadequate consideration, or surprise, has entered into the dealings between the parties, and, in whole or in part, afforded the ground for equitable relief. It is, therefore, impossible to introduce a classification which will be perfectly accurate. The relief granted in all these cases is properly referable to the head of fraud, and whether in each case it be actual, or only constructive fraud, or a mixture of both, is, so far as the remedy is concerned, a matter of minor importance.

SECTION III.

OF TRANSACTIONS WHERE AN UNCONSCIENTIOUS ADVANTAGE HAS BEEN TAKEN OF THE MENTAL WEAKNESS OF A PARTY.

HAVING thus considered how equity deals with cases arising between parties standing to each other in a relation implying confidence, we pass to another class of cases in which an unconscientious advantage has been taken of persons disabled by Weakness, Infirmity, Age, Lunacy, Idiocy, Drunkenness, Coverture, Infancy, or other incapacity, from protecting their own interests.

It has already been stated, that the consent requisite to make a valid agreement is an act of reason, accompanied with deliberation; the mind weighing, as in a balance, the good and evil on either side; and it was further remarked, that every true consent implies, first, a physical power; secondly, a moral power of consenting; and thirdly, a serious and free use of them.[1] Creatures void of reason and understanding are incapable

[1] Ante, p. 170. 1 Fonb. Eq. B. 1, ch. 2, § 1.

of giving a serious and firm assent. If the party had not sufficient mental capacity to give consent, or if the consent were obtained by fraud, duress, surprise, or undue influences, no valid contract can be made.

If, then, the acts and contracts of a person *non compos mentis* be in general invalid, as they obviously must be in reason and justice, the inquiry is, by whom and in what manner can they be avoided? It was laid down by the early writers of the common law, that no man of full age should be admitted to stultify himself. In Beverly's case,[1] it was held that the deed, feoffment or grant, which any man *non compos mentis* makes, is voidable not by himself, but by his privies in blood, or in representation. In the same case, Coke says, every act which a person *non compos* does, either concerns his life, his lands or his goods; also every act which he does, is either *in pais* or in a court of record; all acts which he does in a court of record, either concerning his lands or goods, shall bind himself and all others forever; all acts which he does concerning his lands or his goods *in pais*, in some cases shall only bind himself during his life, and in some shall bind forever. The same doctrine is laid down in Bacon's Abridgment, under the head of Idiots and Lunatics, and the reason assigned why a man shall not be permitted to disable himself, is to prevent the insecurity that might arise in contracts from counterfeit madness and folly; and from the repugnancy that the party should know or remember what he did. But the heirs and executors may avoid such acts *in pais*, by pleading the disability; for there is no such repugnancy in their pleading it.[2] But this ancient rule of the common law has, in modern times, given way in England to more enlightened notions of justice,[3] and it has been wholly repudiated in this country.[4] Courts of equity have, in England, held that the maxim before mentioned is to be understood of acts done by the lunatic in prejudice of others, but not as to acts done by him in prejudice of himself, for this can have no foundation in reason and natural justice.[5]

With regard to what constitutes a want of mental capacity, the rule in equity is the same as at law. There cannot, says Lord Hardwicke, be two rules of judging in law and in equity, upon the point of insanity.[6] And in Osmand v. Fitzroy, the master of the rolls said, there was no such thing as an equitable incapacity, when there is legal capacity.[7]

[1] 4 Coke, 123.

[2] Bac. Abr. tit. Idiots and Lunatics, F. 2 Bl. Com. 291. Litt. § 405. Co. Litt. 247, a.

[3] Gates v. Boen, 2 Str. 1104.

[4] 2 Kent's Com. 451. Dean's Med. Jur. 530. Rice v. Pelt, 15 J. R. 503. Mitchell v. Kingman, 5 Pick. 431. Webster v. Woodford, 3 Day, 90.

[5] 1 Fonb. Eq. B. 1, ch. 2, § 2.

[6] Bennett v. Vade, 2 Atk. 327.

[7] 3 P. Wms. 130.

We shall have occasion, in a subsequent chapter, to treat of the subject of idiots, lunatics, and persons of unsound mind, and habitual drunkards, and of the mode in which the jurisdiction over this class of persons and their estates is exercised by courts of equity.[1] At present we are treating of the relief afforded by the courts against the acts of these persons, in connection with the subject of fraud, either actual or constructive. It is sufficient, therefore, in this place, to say that a lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses and sometimes not, and that frequently depending upon the changes of the moon. But under the general name of *non compos mentis*, which Sir Edward Coke says, is the most legal term, are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that grow deaf, dumb and blind, not being born so, or such, in short, as are adjudged by the court incapable of conducting their own affairs.[2]

The question with respect to the mental capacity necessary to make a valid deed arose in an action of ejectment, and was decided by the supreme court, in a leading case.[3] It was there laid down, that to establish incapacity in a grantor, he must be shown to have been at the time *non compos mentis*, in the legal acceptation; that by that term was meant not a partial but an entire loss of the understanding. The ground was taken by the learned judge, that the common law seems not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. Weakness of understanding is not, of itself, any objection to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for the reason for his actions. These principles have been frequently affirmed since, as well in relation to deeds as to wills.[4] The full discussion of this branch of the subject belongs to treatises on medical jurisprudence.[5]

Such being the law with respect to mental competency, we will proceed to show in what manner courts of equity deal with the subject. As persons laboring under this malady are incapable of entering into a valid

[1] See post, Chapter on Idiots, &c.

[2] 1 Bl. Com. 315.

[3] Jackson v. Caldwell, 4 Cowen, 207.

[4] Odell v. Buck, 21 Wend. 142. Stewart v. Lispenard, 26 id. 298 et seq. Clark v. Fisher, 1 Paige, 171. Blanchard v. Nestle, 3 Denio, 37. Osterhout v. Shoemaker, id. note.

[5] See Dean's Med. Juris. 555 et seq. 2 Mad. Ch. Pr. 565 et seq.

contract, any individual who knowingly deals with them, is chargeable with fraud.

The extreme anxiety of courts of law to protect the authority of their records, has, in former times, led them to give efficacy to a fine levied by a man who was obviously an idiot, and obtained by a gross contrivance. But in equity, the remainderman was relieved against a fine levied by an idiot, even against a purchaser. The court of chancery, however, in the case of fraud, it is said, does not set aside or vacate the fine; but considering those who have taken it under such circumstances, as trustees, decrees a reconveyance of the estate to the persons prejudiced by the fraud.[1]

The deed of a person non compos mentis, may be avoided for fraud, in a court of law, but the action of ejectment must be brought in the name of the lunatic, and not in that of his committee.[2] And this is so though the inquisition find the party of unsound mind from his nativity.[3] And the action may be brought against the lunatic, by his grantor, if the lunatic be in possession; but to constitute a defense it must be shown that there was a total want of understanding in the grantor, at the time the deed was executed.[4] In analogy to these cases, it should seem that if the lunatic seek to set aside the deed, in a court of equity, for fraud, the action should be in his own name if he be living, notwithstanding there be a committee of his person and estate. The committee is a mere bailiff or servant, and the interest and right of action remain in the lunatic. And the action should be brought by him who has the legal interest. And this is so, whether the action be for the recovery of real or personal property, and whether the action be at law or in equity.[5]

[1] Mansfield's case, 12 Coke, 124. Fonb. Eq. B. 1, ch. 2, § 2, and note k. Rushloy v. Mansfield, Tothill's Trans. 42. Addison v. Mascall, 2 Vern. 678. Wilkinson v. Brayfield, 2 Id. 307.

[2] Lane v. Schermerhorn, 1 Hill, 97. Petrie v. Shoemaker, 24 Wend. 85. Osterhout v. Shoemaker, 3 Denio, 37, note.

[3] Id.

[4] Odell v. Buck, 21 Wend. 142.

[5] Lane v. Schermerhorn, 1 Hill, 97. Stewart v. Graham, 19 Ves. 312. Cox v. Dawson, Noy's R. 27. Shelf. on Lun. 395. But see 2 Madd. Ch. Pr. 592, 593; Teal v. Woodworth, 3 Paige, 470; New v. New, 6 id. 237; Gorham v. Gorham, 3 Barb. Ch. R. 24. But now, by statute, L. of 1845, p. 91, § 2, receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the court of chancery, may sue in their own name, for any debt, claim or demand transferred to them, or to the possession or control of which they are entitled as such receiver or committee, and when ordered to sell such demands, the purchaser thereof may sue and recover therefor in his own name, but shall give such security for costs to the defendant, as the court in which such suit is brought may direct.

It was held by Chancellor Kent that it is not necessary for the lunatic to be a party plaintiff with his committee, to set aside an act done by the lunatic while under mental imbecility. He deemed it matter of form; and thought the lunatic might be joined with his committee, or omitted. The general practice was said to be to unite the lunatic with the committee, as was done in 2 Vern. 678.[1] The provisions of the New-York code of procedure would seem to require the action to be brought in the name of the lunatic, he being the real party in interest.[2] But it must undoubtedly be conducted under the direction of the committee.[3]

A person deaf and dumb from his nativity is not therefore an idiot or non compos mentis; though such perhaps may be the legal presumption until his capacity is proved, on inquiry and examination for that purpose.[4]

Irrespective of fraud in other respects, it should seem that a conveyance, executed by a person who at the time was a fit subject for a commission, under the statute, to a party *knowing of the incapacity*, would be relieved against in equity;[5] but a weakness and incapacity falling short of this, will not afford ground for the interposition of the courts, without some other evidence of fraud, imposition, surprise, or inadequacy of consideration.[6] For, as was said by Sir Joseph Jekyl, when a weak man gives a bond, if there be no fraud or breach of trust in the obtaining it, equity will not set it aside, for the weakness of the obligor, if he be *compos mentis;* neither will the court measure the size of people's understanding or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity.[7] But in the case he was considering, there was both fraud and a breach of trust in obtaining the bond, and it was given for a sum grossly disproportioned to the services of the obligee, and the court set it aside, on the ground of fraud.

But a party making a contract with a person whom he *knows to be a fit subject for a commission*, is guilty of a fraud. Such is the inference of law. And the case must be very special indeed, which should induce the court to withhold relief against this act.

[1] Ortley v. Messere, 7 J. Ch. R. 139.

[2] Code, § 111. Grinnell v. Schmidt, 2 Sandf. S. C. R. 706.

[3] L. of 1845, p. 91, § 2.

[4] Brown v. Fisher, 4 J. Ch. R. 441.

[5] In the matter of Morgan, 7 Paige, 236. In this case the chancellor says: "Many cases may arise in which the mind and memory are so far impaired as to afford grounds for setting aside an improvident agreement made by a person in that situation, upon a bill filed for that purpose, when the court would not have the power to deprive him of the right to the possession and control of his property, on the supposition that he was a person of unsound mind." And see Blackford v. Christian, 1 Knapp's R. 77.

[6] Sprague v. Duell, 11 Paige, 480. Odel v. Buck, 21 Wend. 142. Osterhout v. Shoemaker, 3 Denio, 37, n.

[7] Osmond v. Fitzroy, 3 P. Wms. 130.

At law, the acts of a lunatic before office found are not void but voidable; alienations by a lunatic, or other person of unsound mind, after office found, are absolutely void.[1] But a court of equity will not interfere to set aside a contract, overreached by an inquisition in lunacy, if fair and without notice, especially when the parties cannot be reinstated.[2] Relief in equity in such cases, depends, it is said, very much upon the circumstances, and no general rule can be laid down upon it.[3]

And it has been held in Massachusetts, that a person under guardianship as *non compos mentis* may make a will, if he is in fact of sound mind, at the time of its execution. The existence of the relation of guardianship affords, indeed, *prima facie* evidence of insanity, but it may be repelled by showing a testamentary capacity. The act of making a will is distinguishable from contracts, and other acts to be done *inter vivos*, and involves no conflict of authority with the guardian, in this respect, because the will cannot operate to any purpose, till the death of the testator, and by that event, the authority of the guardian is determined.[4]

An inquisition is only *presumptive* evidence of insanity, and not *conclusive;* so that upon an action in respect of any contract or deed, it is for a jury to determine, whether, at the time of executing it, the party was *non compos*, though by the inquisition he was found to be *non compos* at such period.[5] Such inquisition is *admissible*, though not *conclusive* evidence of the lunacy of the party, in an action brought against him upon a contract.[6] Where upon a bill for a specific performance of a contract overreached by a commission of lunacy, the plaintiff not having traversed the inquisition, an issue was directed to inquire whether the defendant was a lunatic at the execution.[7]

In one case where the lunatic was possessed of a large estate, and had so far recovered his reason as to be capable of disposing of his estate by will, with sense and judgment, the chancellor suspended the proceedings against him, partially, so as to enable him to make a will.[8] The effect of such suspension, if its terms were complied with, removed the *prima*

[1] Jackson v. Gumaer, 2 Cowen, 568. Burnby's case, 4 Coke, 124. 2 Madd. Ch. Pr. 594.

[2] Niell v. Morley, 9 Ves. 478.

[3] Id.

[4] Breed v. Pratt, 18 Pick. 115. Stone v. Damon, 12 Mass. 487. Leonard v. Leonard, 14 Pick. 280. Hall v. Warren, 9 Ves. 610.

[5] 2 Mad. Ch. Pr. 573. 1 Collinson on Lunacy, 462. Bac. Abr. tit. Idiots and Lunatics, B.

[6] Hart v. Deamer, 6 Wend. 497. Osterhout v. Shoemaker, 3 Hill, 513. Cowen & Hill's Notes, 942. Shelf. on Lunacy, 63, 65. 1 Phil. Ev. 300. Sergeson v. Sealy, 2 Atk. 412.

[7] Hall v. Warren, 9 Ves. 605.

[8] In the matter of Burr, 2 Barb. Ch. R. 208.

facie presumption of a want of testamentary capacity, and left it, as in other persons, a matter of proof. But the case does not show that a person against whom an inquisition of lunacy remains in full force, may not, if his competency be in truth restored, make a valid testamentary disposition of his property.

But a court of equity relieves not only against acts done by idiots and lunatics, but by acts done and contracts made by one under the influence of drunkenness. In this state, where an habitual drunkard, equally with an idiot or lunatic, is the subject of a commission, no valid objection can be urged to relief against an act committed in a fit of intoxication in which the party was utterly deprived of his reason and understanding.[1] Lord Hardwicke on one occasion was of opinion that the drunkenness of one of the parties was not sufficient to set aside an agreement, unless some unfair advantage was taken; and, therefore, in the case before him, the agreement not being unreasonable, and no unfair advantage appearing to have been taken, he refused to set it aside, though the party complaining of it was drunk when he executed it.[2] But that was a case where parties had come to a reasonable agreement, in family matters, in which the court goes a great way to carry it into execution.[3]

Courts of equity have manifested a disposition not to give assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, not to assist a person to get rid of any agreement, or deed, *merely* upon the ground of his having been intoxicated at the time; but if there was any unfair advantage taken of his situation, or any contrivance or management to draw him in to drink, he might be a proper object of relief in a court of equity.[4] As to that extreme state of intoxication that deprives a man of his reason, I apprehend, says Sir William Grant, that even at law, it would invalidate a deed obtained from him while in that state.[5] And this seems so to have been decided, and to be admissible in evidence in an action upon a bond under the plea of *non est factum*.[6] But the courts have not enforced agreements specifically which were obtained by a party while in a state of intoxication.

[1] 1 Fonb. Eq. B. 1 ch. 2, § 3 and notes.

[2] Corey v. Corey, 1 Ves. 19; and see remarks of Lord Eldon in this case, in Stockley v. Stockley, 1 Ves. & B. 31.

[3] Id.

[4] White v. Cox, 3 Hayw. 82.

[5] Cook v. Clayworth, 18 Ves. 15.

[6] Cole v. Robbins, Bull. N. P. 172. Mad. Ch. Pr. 239.

[7] Seymour v. Delancy, 3 Cowen, 445

As the validity of agreements depends on the intelligent assent of the reason thereto, it would seem to be unimportant whether the deprivation of mental capacity be from the visitation of God, or from the act of the party himself. It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation; and if so, the contracts of such persons would, one might think, be relievable in equity.[1] The writers on natural law, Heineccius, Puffendorff and Pothier, all agree in considering contracts under such circumstances as invalid.[2] With respect to wills, it is said by Swinburn, that "he that is overcome by drink, during the time of his drunkenness is compared to a madman, and, therefore, if he make his testament at that time, it is void in law; which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of his reason and understanding; otherwise, albeit, his understanding is obscured, and his memory troubled, yet he may make his testament being in that case."[3]

It has already been said that, at law, mere weakness of mind, if the man be legally *compos mentis*, is no defense to an action founded on the contract, or other acts of such party.[4] To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself *essential* to legal capacity, would, as was well said by Verplanck, senator, in a great case,[5] create endless uncertainty, difficulty and litigation; would shake the security of property, and wrest from the aged and infirm that authority over their earnings or savings which is often their best security against injury and neglect. If you throw aside the old common law test of capacity, then proofs of wild speculations or extravagant and peculiar opinions, or the forgetfulness or the prejudices of old age, might be sufficient to shake the fairest conveyances, or impeach the most equitable will. The law, therefore, in fixing the standard of positive legal competency, has taken a low standard of capacity; but it is a clear and definite one, and therefore wise and safe. It holds, (in the language of a late English commentator, Shelford on Lunacy, p. 39,) that weak minds differ from strong ones only in the extent and power of their faculties; but unless they betray a total loss of understanding, or idiocy or delusion, they cannot properly be considered unsound.

[1] 1 Mad. Ch. Pr. 239. Reinicker v. Smith, 2 Harr. & J. 422. Wigglesworth v. Steers, 1 Hen. & Munf. 70.

[2] Id. 1 Fonb. Eq. B. 1, ch. 2, § 3.

[3] Swinb. Pt. 2, § 6. 1 Will. Ex. 33.

[4] Ante, p. 196. Jackson v. Caldwell, 4 Cowen, 218. Osmond v. Fitzroy, 3 P. Wms. 129. 1 Fonb. Eq. B. 1, ch. 2, § 3.

[5] Stewart's Executors v. Lispenard, 26 Wend. 303. Odell v. Bucks, 21 Wend. 142. Petrie v. Shoemaker, 24 id. 85. Blanchard v. Nestle, 3 Denio, 37.

But, though this be so, when an action at law is brought upon the contract made by a person alleged to be of feeble intellect, or the question be on the legal capacity of the grantor in a deed, or the maker of a last will and testament, it is quite obvious that in a court of equity, when an application is made to set aside the instrument for fraud, or to enforce it specifically, weakness of mind is an element of great importance in examining whether the contract was obtained by fraud, undue influence, imposition or surprise. A rash or hard bargain entered into by men dealing upon equal terms, and where the mental capacity of both is comparatively of the same grade, would create no suspicion of fraud or imposition, while the like bargain obtained by an artful and designing man, from one of weak understanding, would create an inference of circumvention or undue influence.[1]

Accordingly, it has been held, that mental imbecility, not amounting to absolute disqualification, induces a strict and vigilant examination in chancery of the contracts made by one laboring under it, and when coupled with gross inadequacy of consideration, they constitute such evidence of fraud as may vacate a contract.[2] It has already been shown that mental weakness, short of this, is not alone sufficient to authorize the court to interfere; but there must be some other evidence of fraud, imposition, surprise, or inadequacy of consideration.[3]

Nor is inadequacy of consideration alone, a sufficient ground in ordinary cases, for setting aside a conveyance of property.[4] In the leading case on this subject[5] Lord Thurlow said, if the court should take such ground as to rest upon the market price, every transaction of the kind would come into equity. It should seem that mere inadequacy is scarcely a sufficient ground, but there is a difference between that and evidence arising from inadequacy. If there is such inadequacy as to show that the person did not understand the bargain he made, or that knowing it, he was so oppressed as to be glad to make it, it will show such a command over the grantor as may amount to fraud. If the transaction be such as marks overreaching on one side, and imbecility on the other, it

[1] 1 Fonb. Eq. B. 1, ch. 2, § 3, note r.

[2] Cruise v. Christopher's Adminstrator, 5 Dana, 182.

[3] Ante, p. 196. In Reinicker v. Smith, 2 Harr. & John., imbecility of mind of one of the contracting parties was held to be sufficient evidence of fraud to set aside the contract.

[4] Fonb. Eq. B. 1, ch. 2, § 9, note d. Osgood v. Franklin, 2 J. Ch. R. 23. Blackford v. Christian, 1 Knapp's R. 77. Dunn v. Chambers, 4 Barb. 376.

[5] Heathcote v. Paignon, 2 Bro. C. C. 167.

puts the parties in such a situation as to show that it could not have taken place without superior power on the one side over the other. And in an other case[1] Lord Thurlow said, that to set aside a conveyance, there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it. This doctrine has been approved by Lord Eldon,[2] and by Sir William Grant.[3] And in this state by Chancellor Kent,[4] and Chief Justice Savage.[5] And in one case Lord Eldon said, if the terms of a bargain are so extremely inadequate, as to satisfy the conscience of the court by the amount of the inadequacy, that there must have been imposition, or that species of pressure upon his distress, which, in the view of a court of equity, amounts to oppression, the court would set it aside, though courts of law might hold that judgment not within the sphere of their powers.[6] What shall be called *gross inadequacy*, has not been defined, unless the saying, "what shakes the conscience," be a definition; but when a sale was for one half the worth, it has been said, that it would be relieved against.[7]

The question of inadequacy must be determined by reference to the state of things when the bargain was made, and not by changes occasioned by subsequent events.[8]

In cases where imbecility of mind, and inadequacy of consideration unite, though neither standing alone is sufficient under ordinary circumstances to invalidate a contract, the court has granted relief without other evidence of imposition. Thus, in one case, when a weak man sold an inheritance worth forty pounds a year for an annuity of twenty pounds a year, and this annuity secured only by a covenant instead of a mortgage of the estate; and this too, to a person seventy-two years old, and who had not the deed itself in his hands, it was declared by the court to be fraud apparent, and judging upon the face of a deed is judging upon evidence which cannot err; whereas the testimony of witnesses may be false.[9]

So where imbecility of mind and inadequacy of consideration, were united with an abuse of confidence which the one party reposed in the

[1] Gwynne v. Heaton, 1 Bro. C. C. 9.

[2] Coles v. Trecothick, 9 Ves. 246. Gibson v. Leyes, 6 id. 273.

[3] Peacock v. Evans, 16 Ves. 512.

[4] Osgood v. Franklin, 2 J. Ch. R. 23.

[5] Seymour v. Delancy, 3 Cowen, 516, 517.

[6] Underhill v. Horwood, 1 Ves. 249.

[7] 1 Mad. Ch. Pr. 214.

[8] Batty v. Lloyd, 1 Vern. 141.

[9] Clarkson v. Hanway, 2 Pierre Wms. 204.

other, the court interposed and set aside the sale of an annuity by the attorney to his client.[1]

So a purchase and repurchase of a legacy, expectant on a death, the consideration being inadequate and advantage taken of the pecuniary distress of the party, the whole transaction was set aside, as was also a subsequent bond given as a confirmation, because given under an idea that the obligor was bound by the former transaction.[2]

So on a bill for a specific performance of a contract for the sale of an estate, it was said that the court was not bound to decree a specific performance in every case, where it would not set aside the contract; nor to set aside every contract, that it would not order to be specifically performed. Under circumstances amounting to a breach of trust, inadequacy of consideration arising from gross negligence of the agent and a want of due authority, the bill was dismissed, though the plaintiff was unimpeached; and it was said that no specific performance would be decreed if the party labored under any *surprise* making it not fair and honest to call for it.[3]

These principles have been often applied in this country, by courts of equity. Thus a pretended purchaser, holding influence over the mind of a weak and credulous man, was not permitted to enjoy a contract gained at an inadequate price.[4] A conveyance obtained by children, from a father, will not be sanctioned by a court of equity, if it appear to have been procured by an abuse of confidence reposed by him in his children; who for the purpose of procuring it, took advantage of his age, imbecility and partiality for them; the conveyance being also for an inadequate consideration.[5] So an unconscionable bargain obtained by imposition and fraud, from a weak or intemperate man, it was said would be relieved against.[6]

It has been shown under the head of dealings between parties standing to each other in confidential or fiduciary relations, with what jealousy the transactions of the parties are watched, and what circumstances superadded to the breach of confidence would be seized on by the court, in order to grant relief. Though inadequacy of price will not alone be a ground for setting aside a contract, yet it has been seen that if the contract be obtained by one standing in a peculiar relation of confidence to the party from whom it was obtained; if the latter be of weak under-

[1] Gibson v. Jeyes, 6 Ves. 266.
[2] Crowe v. Ballard, 1 Ves. jr. 215.
[3] Mortlock v. Buller, 10 Ves. 292.
[4] Dealty's Heirs v. Murphy, 3 A. K. Marsh. 475.
[5] Whelan v. Whelan, 3 Cowen 537.
[6] Whipple v. McClure, 2 Root, 216.

standing; if there be misrepresentation, or surprise; if the latter be in circumstances of great pecuniary distress, a court of equity will interfere. In like manner, though weakness of mind alone, be not enough to set aside a contract, if the party be *compos mentis*, yet, if there be other circumstances, such as inadequacy of price, imposition, surprise, abuse of confidence and the like, the benign jurisdiction of the court can be successfully invoked.[1]

The term *surprise* does not seem to have any precise, or peculiar definition in a court of equity. Like fraud, it does not admit of being described by its constituent parts, but is infinitely variable. It is defined by Webster, as the act of coming upon unawares, or of taking suddenly and without preparation. The state of being taken unexpectedly. This is sufficiently accurate for all practical purposes. On a bill for a specific performance of an agreement brought by the vendor against the purchaser at an auction sale, the agent of the vendor bid at the sale, without any previous intimation to the purchaser, who was ignorant of that fact, and Lord Kenyon refused to decree a specific execution, saying that the court was not bound to execute every contract, and if there was any sort of *surprise*, that made it not fair and honest to call for an execution, he would not give the relief of a specific performance, but leave the parties at law.[2] This was approved by Lord Eldon.[3] In this case, the word *surprise* means, that an unexpected event occurred at the sale, without the fault of the purchaser, and prejudicial to his interest. Whatever happens without the agency or fault of the party affected by it, tending to disturb and confuse his judgment, or to mislead him, and of which the opposite party takes an undue advantage, is a surprise. It is treated by a celebrated author under the head of mistake; and as analogous to the misapprehension of the party, which has been held a ground of relief. But he very properly observes that it is not every surprise that will avoid a deed duly made; nor is it fitting; for it would occasion great uncertainty, and it would be impossible to fix what is meant by surprise, for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be. But the surprise here intended must be accompanied with fraud and circumvention,[4] and like other acts of fraud, must be proved, or presumed from the facts and circumstances of the case.

[1] Per Harris, P. J. in Dunn v. Chambers, 4 Barb. 379.

[2] Turnuy v. Morrison, 2 Bro. C. C. 326.

[3] Mortlock v. Buller, 10 Ves. 301.

[4] 1 Fonb. Eq. B. 1, ch. 2, § 8.

Lord Eldon, in one case, uses the term surprise and mistake, in opposition to fraud, as grounds of relief,[1] or as ground of objection to a bill for specific performance. And in another case, a conveyance by lease and release and fine, was set aside upon great inadequacy of consideration, combined with misrepresentation and *surprise* upon parties in extreme distress, ignorant of their interest, and not properly protected.[2]

It is seldom that a transaction rests upon surprise alone. The equity to be relieved from an act occasioned by surprise, is referable more properly to fraud than mistake, though perhaps there is a mixture of both. The party who obtains an advantage from another, knowing him to be acting without deliberation, and without the counsel of friends; or that he is acting upon an event which has happened suddenly and unexpectedly, without time to calculate the consequences, is guilty of fraud. In granting relief in such cases, the court acts upon the same principles which govern it in vacating contracts obtained by imposition and fraud. As full assent is necessary to a valid agreement, if that is prevented by surprise, and without fault of the party, it would seem to be a fit case for equitable relief.

There are numerous other cases where equity grants relief on the ground of actual fraud, and which are not referable to either of the foregoing heads. Equity sometimes interferes and prevents the pirating of trade marks. The question, in such cases, is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade mark, nor whether the article made and sold by the defendant, under the complainant's trade mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business; and that having appropriated to himself a particular label or sign, or trade mark, indicating that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of the complainant's friends, or customers, or of the patrons of his trade or business, by using his trade mark without his consent.[3]

This same principle has been extended to restrain the publication of

[1] The Marquis of Townshend v. Stangroom, 6 Ves. 339.

[2] Pecket v. Lagoon, 14 Ves. 215.

[3] Patridge v. Menck, 2 Barb. Ch. 101; S. C., 2 Sandf. Ch. R. 622. Taylor v. Carpenter, 11 Paige, 292.

a newspaper, when the name of the complainant's newspaper was used by the defendant, in such a manner as to be calculated to deceive or mislead the public, and to induce them to suppose that the paper printed by the defendant is the same as that which was previously published by the complainant; and thus to injure the circulation thereof.[1]

The same principle was applied by Lord Langdale, who restrained a defendant from running an omnibus having upon it such names, words and devices as to form a colorable imitation of the words, names and devices on the omnibuses of the plaintiff.[2]

Numerous other cases of a similar character are found in the books, but the consideration of them more appropriately belongs to a subsequent head, that of preventing fraud by injunction and otherwise. We will notice the case of fraud on powers, and illusory appointments, and then proceed to some cases more properly referable to constructive fraud than moral fraud.

A party will not be allowed to execute a power for his own benefit. Thus in Lord Landank's case, a father having a power of appointment, and thinking one of his children was in a consumption, appointed in favor of that child; and the court was of opinion that the purpose was to take the chance of getting the money as administrator of that child.[3] That was a fraud upon other persons having an interest in the execution of the power. But the court will not act against the title upon the mere suspicion that a transaction was of that nature.[4]

The subject of the due execution of a power of appointment, and whether the disposition made, was or was not within the power, or whether part of the subject being appointed to one of the objects was so insignificant as to be considered by the court as illusory, caused in former times more doubt and difficulty in the mind of judges than most others. The remarks of the master of the rolls in an important case, explain the general nature of this subject, and the course of the court.[5] In a later case,[6] Sir William Grant strongly questioned the propriety of the interference of courts of equity in matters of this kind, and said that he found it impossible to understand how the question, whether a power was well or ill executed, could receive different interpretations in different courts. As the doctrine is now abolished in England, it seems unnecessary to review

[1] Bell v. Locke, 8 Paige, 75. Snowden v. Noah. Hopkins' R. 347.

[2] Knott v. Morgan, 2 Keene, 213.

[3] McQueen v. Farquar, 11 Ves. 479.

[4] Id. 467.

[5] Vanderzee v. Aclom, 4 Ves. 784, 785.

[6] Butcher v. Butcher, 9 Ves. 382.

the cases, especially as the revised statutes of this state have introduced a principle which effectually abrogates it with us.[1] By the revised statutes it is declared that when a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion. But when the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons, in exclusion of the others. The object of these sections, the revisers remark in their notes, (3 R. S. 591, 2d ed.) was to prevent the interference of equity in correcting what are called *illusory* appointments—a jurisdiction very questionable in itself, and of which the limits were uncertain.[2]

It has already been said that it is essential to every contract that there be the free assent of the parties; and that consent supposes a physical power, a moral power, and a serious and free use of both. Hence agreements entered into under duress are void at law and relievable in equity.

Duress is of two kinds; duress of imprisonment and duress *per minas* Duress of imprisonment is defined by the older cases to be the illegal restraint of liberty.[3] And duress *per minas* is the fear of loss of life, or the fear of mayhem, or loss of limb. And this fear must be upon sufficient reason. A fear of battery, or being beaten, though never so well grounded, is no duress; neither the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases should the threat be performed, a man may have satisfaction by recovering equivalent damages.[4] The modern cases hold that there may be duress of imprisonment even when the imprisonment is under legal process, and that to constitute duress *per minas*, it is not essential that the party be threatened with loss of life or limb, or with mayhem; but it is enough if he acts from fear excited by threats of illegal imprisonment.[5]

It is in analogy to this principle that a court of equity watches with extreme jealousy all contracts made by a party under the pressure of great

[1] 1 R. S. 734, § 98.

[2] See remarks of Ch. Walworth in Walker v. Devereaux, 4 Paige, 249, 250.

[3] 1 Black. Com. 139.

[4] Id. 133. 2 Inst. 483. Co. Lit. 253, b. See note E. to Cole v. Gibbons, 3 P. Wms. 294, showing that a bond given *freely*, for a note obtained under duress, will not be set aside in equity.

[5] Foshay v. Ferguson, 5 Hill, 154. Thompson v. Lockwood, 15 J. R. 256. Champlain v. The People, 2 Comst. 83. Evans v. Pegleys, 2 Wend. 243. Watkins v. Baird, 6 Mass. R. 506. Richardson v. Duncan, 3 N. H. 508.

pecuniary distress; and contracts made with persons who are in a condition to exercise a controlling influence over the will or conduct of others. Some of them have already been considered under their proper heads, and others perhaps are referable to cases of constructive fraud.

Contracts with infants or femes covert are also relievable on the ground of incapacity to contract, or the constraint under which they are placed.

SECTION IV.

OF CONSTRUCTIVE, OR IMPLIED FRAUD.

In this chapter, we have hitherto treated of cases having their origin in actual moral fraud, and relievable under that head, and of cases of a mixed character, arising out of the confidential or fiduciary relation of the parties, and which are watched with peculiar jealousy by a court of equity, from their great temptation to abuse, and which are often mingled with transactions partaking more or less of actual fraud, either towards third persons, or one or more of the parties themselves. And we have also treated of cases where an unconscientious advantage has been taken of the mental weakness of a party. We shall now proceed to the consideration of another class of cases, relievable in equity, either on the ground of their being against public policy, or the provisions of some statute. These cases, too, sometimes embrace all the elements of moral fraud. But, in general, the design is not to deceive the individual with whom the contract is made, but to gain some advantage inconsistent with fair dealing or the rights of third persons. These acts, from their tendency to defraud, are forbidden by law, though the motive of the parties in the particular case, be not shown to be fraudulent and corrupt. They are usually denominated, by the courts, constructive or implied frauds.

The first of this class of constructive frauds which we will notice, are what are usually denominated underhand agreements. These are agreements by which a creditor who has executed a deed of composition with an insolvent debtor, reserves to himself a greater advantage than the other creditors would have under the deed. If this be done without the knowledge or consent of the other creditors, it is a fraud upon them, and will be set aside.[1] So a bond to one creditor, to secure the deficiency of

[1] Mawson v. Stock, 6 Ves. 300.

composition, not communicated to the others, is bad. But if taken with their privity and consent, is not open to objection.[1] Between the parties to the transaction, there is no design by the one to defraud the other. But its tendency is to defraud the other creditors, and hence, on the ground of public policy, it is condemned both at law and in equity.[2]

The invalidity of marriage brocage bonds rests upon the same principle of public policy. It is laid down as a rule in the civil law, that marriage ought to be free, and the same policy has obtained in equity. And therefore in case of a bond in common form for payment of money, but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond, the court will decree this bond to be canceled as being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any compulsion.[3] Thus, when it appeared that the marriage was brought about without the consent of the young woman's parents, who were then living, the lord chancellor, for that reason alone, on a bill filed to be relieved against a marriage brocage bond, decreed the bond to be delivered up, terming it a sort of kidnapping; and said there was a material difference, where the parties were at their own disposal, and when their parents were living; though such a bond was in no case to be countenanced.[4] So, whenever a father or mother or guardian insists upon a private gain, or security for it, and obtains it of the intended husband, it shall be set aside; for the power of a parent or guardian ought not to be made use of to such purposes. You shall not have my daughter, unless you do so and so, is to sell children and matches. And these contracts with the father seem to be of the same nature with brocage bonds, but of more mischievous consequences, as that which would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, takes a bond of the son to pay him so much, it is void, being done by coercion, while he is under the awe of his father. Nor will the court only decree a marriage brocage bond to be delivered up, but a gratuity of fifty guineas actually paid to be refunded; for such bond is

[1] Jackman v. Mitchell, 13 Ves. 586.

[2] Yeoman v. Chatterton, 9 J. R. 295. Payne v. Eden, 3 Caines' R. 213. Wiggins v. Bush, 12 J. R. 306. Tuxbury v. Miller, 19 id. 311. Leicester v. Rose, 4 East, 372. Child v. Danbridge, 2 Vern. 71. Small v. Brackly, 2 id. 602. 1 Atk. 105.

[3] 1 Fonb. Eq. B. 1, ch. 4, § 11.

[4] Drury v. Hook, 1 Vern. 412. Key v. Bradshaw, 2 id. 102. Lamlee v. Hanman, 2 id. 499. Duke of Hamilton v. Mohun, 2 id. 652. Keaf v. Allen, id. 588. Toche v. Atkins, 1 id. 451. Gale v. Lindo, id. 475. Kemp v. Coleman, 1 Salk. 156. Baker v. White, 2 Vern. 215.

in no case to be countenanced. And a bond to procure marriage, though between persons of equal rank and fortune, is void, as being of dangerous consequence.[1]

The principles contained in the foregoing extract are supported by the American, as well as by the English cases. Thus, in one case, Chief Justice Parsons says that marriage brocage bonds, which are not fraudulent on either party, are yet void, because they are a fraud on third persons, and are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends; and they are relievable against as a general mischief, for the sake of the public.[2]

On the same principle of public policy a secret settlement by a woman on the eve of her marriage, and in contemplation of that event, is fraudulent and void against the husband.[3] Agreements on marriage, are very different from common contracts; and all underhand agreements, derogatory therefrom, are in fraud of the marriage, and void.[4]

The good faith which is required in all contracts is eminently necessary in a contract so important both to the parties and the public, as that of marriage. Although the court cannot, after the marriage has taken place, fully restore the parties to the condition in which they were before the marriage, it can set aside conveyances made in fraud of the marriage. An unmarried woman has a right to dispose of her property as she pleases, and as a conveyance made by her, immediately before her marriage, is *prima facie* good, it is to be impeached only by the proof of fraud. This fraud may be accomplished by false representations, or by undue concealment. A widow having children by a former husband, and contemplating marriage, is performing a moral duty if she makes provision out of her property, for such children. But in performing this duty, she has no right to act fraudulently towards her second husband.

If a woman, entitled to property, enters into a treaty for marriage, and during the treaty represents to her intended husband that she is so entitled, that upon the marriage, he will become entitled *jure mariti*, and if during the same treaty, she clandestinely conveys away the property, in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt that a fraud is thus practiced on the husband, and he is entitled to relief.[5]

[1] 1 Fonb. Eq. B. 1, ch. 4, § 11; and see cases under last note.

[2] Boynton v. Hubbard, 7 Mass. R. 118.

[3] Linker v. Smith, 4 Wash. C. C. 224.

[4] Per Smith, J., Lessee of Whitehil. v. Dorsay, 2 Yeates, 109.

[5] Per Lord Langdale, in England v Downs, 2 Beavan, 528.

The equity in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question, whether the facts proved do or do not amount to sufficient evidence of fraud practiced on the husband. It is not doubted that proof of direct misrepresentation, or of willful concealment with intent to deceive the husband, would entitle him to relief; but it was insisted that mere concealment was not in such case any evidence of fraud; and if a man, without making any inquiry as to a woman's affairs and property, thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain, if, in the absence of any care on his part, she has taken care of herself and her children without his knowledge.[1]

This proposition, however, said Lord Langdale in the same case, cannot be admitted as stated; and, clearly, a woman in such circumstances can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband.[2]

Although the husband has no notice of the existence of property of the wife, upon the marriage, and is, therefore, not in fact disappointed in not receiving any, yet if she had property before the consummation of the marriage, and made a settlement, concealing from him both her right to the money and the existence of the settlement, it is a fraud upon his marital rights; and a court of equity, even ten years after her death, in one case, relieved against such a settlement and ordered the money paid to the husband.[3]

It is a principle which has long prevailed both at law and in equity, that if a representation is made upon the circumstances of a person about to form a connection in marriage, and that representation is of such a nature, that, if not made good, or if varied, it will materially affect the circumstances in life of that party, courts both of law and equity, will hold the party bound to make good that representation, even at the suit of individuals concerned in fraudulently defeating such a representation upon which that connection was proceeding.[4]

Upon this principle, when upon a marriage of a son the father made a settlement of an annuity on the intended wife in full of her jointure, and in lieu of dower, and the son secretly gave a bond of indemnity of the same date, to his father, against the annuity, the bond was held to be a fraud upon the marriage contract, and was set aside. The open agree-

[1] Per Lord Langdale, in England v. Downs, 2 Beavan, 528.

[2] Id. 529.

[3] Godard v. Snow, 1 Russ. 485. Lewellin v. Cobbold, 19 Eng. L. and Eq. 45, 17 Jurist, 448.

[4] De Manneville v. Crompton, 1 Ves & Beame, 355.

ment put the parties contracting marriage, in one situation, and the private agreement put them in another and worse situation. By the open agreement, the son apparently finds the means of providing for his wife without resorting to his own fortune; whereas the effect of the private agreement is to throw the burden entirely upon his own fortune; by which he is to that extent prevented from providing for his family as he otherwise might. This was just as much a fraud upon the marriage contract, as if receiving a fortune, he returns part of it. His capacity for providing for his family is equally diminished in both cases.[1]

The same principle arose in another case, when the brother, on a treaty of marriage of his sister, let her have £160 privately, that her fortune might appear to be as much as was insisted on by the other party, and took the bond of the sister to repay it, the bond was relieved against after the death of the son and the sister who survived her husband.[2]

The foregoing were cases where the fraud was perpetrated by *one of the parties* to the settlement. But the principle is applicable *to a stranger* who interferes in the matter with a material concealment, misleading one of the parties. Thus, where a party holding a bond against a man about forming a treaty of marriage, at the request of the latter, concealed the existence of the same from the wife's father, equity restrained the creditor, by injunction, from enforcing his debt, although it did not appear that there was any actual stipulation on the part of the wife's father, in respect of the amount of the intended husband's debts.[3]

As contracts of this nature are avoided on reasons of public inconvenience, they do not admit of subsequent confirmation of the party.[4]

Equity, it is said, abhors underhand agreements in cases of marriage, and perhaps this may be the only instance in equity, said the master of the rolls, when a person, though *particeps criminis*, shall yet be allowed to avoid his own acts.[5] In general, but not always, courts of equity act upon the maxim, *in pari delicto potior est conditio defendentis, et possidentis*. But in cases where relief is sought on the ground that the agreement or transaction is against public policy, the circumstance that the plaintiff is *particeps criminis*, is not, in equity, controlling. The public interest is the paramount consideration in these cases, and that can only

[1] Palmer v. Neave, 11 Ves. 164.

[2] Gale v. Lindo, 1 Vern. 475. Lamlee v. Hanman, 2 id. 499.

[3] Neville v. Wilkinson, 3 P. Wms. 75, note. The doctrine of estoppel *in pais*, is applicable to this kind of frauds. See Welland Canal Co. v. Hathaway, 8 Wend. 480. Dezell v. Odell, 3 Hill, 215. Presbyterian Congregation of Salem v. Williams, 9 Wend. 147. Pierpont v. Barnard, 5 Barb. 364.

[4] Shirley v. Martin, 3 P. Wms. 75, note.

[5] Roberts v. Roberts, 3 id. 74.

be attained through the party. It applies not only to agreements in restraint of marriage, but to all others falling within the like reason, and when public policy requires the agreement should be repudiated.[1]

It is on the principle of public policy that contracts in restraint of marriage are void, both at law and in equity. On this ground a promise by A. to B. to marry her if he marries any body is void.[2] Such promise, without a reciprocal obligation on the part of the promisee, becomes, at the option of the promiser, an engagement not to marry at all. In like manner a wagering contract that the plaintiff would not marry within six years, was held to be *prima facie* in restraint of marriage, and therefore void.[3] And, in another case, an agreement by a man not to marry with any person but the promisee, and if he did, that he would pay one thousand dollars, within three months after he should so marry another, was held to be in restraint of marriage and illegal and void.[4] Though there may be a difference in degree between the restraint of a *first* marriage and a restraint of a *second* marriage, yet the principle is the same, and a bond given in restraint of a second marriage, has been relieved against in equity.[5]

And when mutual bonds were entered into (without the knowledge of their friends,) between a man and woman of suitable age, to marry each other at the expiration of thirteen months, and there was no actual fraud between the parties, Lord Hardwicke relieved against the bond on public and general considerations, and as a fraud on the father.[6] The objection to contracts of this kind, he said, is, that the parents and friends of one of the parties are deceived thereby, and they tend to encourage disobedience, and operate as a fraud on the parents.[7]

[1] Douglass, 697, note. Van Dyck v. Hewett, 1 East, 96. Howson v. Hancock, 8 D. & E. 575. Osborne v. Williams, 18 Ves. 379. 1 Fonb. Eq. B. 1, ch. 4, § 4, and notes. McCullum v. Gourlay, 8 J. R. 147. O'Malley v. Reese, 6 Barb. 658. Morgan v. Groff, 5 Denio, 364; disapproved in S. C., 4 Barb. 528. Like v. Thompson, 9 id. 315. Watts v. Brooks, 3 Ves. jr. 612. Arden v. Patterson, 5 J. Ch. R. 49. The distinction taken by Paige, J., in Morgan v. Groff, 4 Barb. 527, is, that the action will be sustained, *when it provides in disaffirmance of the contract, and on the ground that it is void, and seeks to prevent the defendant from retaining the benefit which he has derived from an unlawful act.* The case he was considering was at law, and the authorities on the subject are well considered. Equity, though it follows the law, administers the same doctrine upon more enlarged principles. 1 Fonb. Eq. B. 1, ch. 2, § 13, and notes. Boyd v. Dunlap, 1 J. Ch. R. 482. Sands v. Codwise, 4 John. R. 536.

[2] Conrad v. Williams, 6 Hill, 445.

[3] Hartley v. Rice, 10 East, 22.

[4] Lowe v. Peers, Burrows, 2225.

[5] Baker v. White, 2 Verm. 215.

[6] Woodhouse v. Shipley, 2 Atk. 535, 539.

[7] Id. There does not seem to be any objection, in a reciprocal contract to marry, that the consummation of the contract is to be deferred to a future day. Such contract made in good faith is

The foregoing are cases where the contracts were made by the parties. But the principle of public policy which renders such contracts void, has a wider scope than the mere action of the parties themselves. Conditions in restraint of marriage may be imposed by others, in connection with legacies or other gifts, and as these are of no unfrequent occurrence, and form a subject on which numerous decided cases may be found, it may be expedient to take a cursory glance at the rules by which they are governed. The subject will be resumed in a subsequent part of this treatise, when we come to speak of legacies generally.

By the doctrine of the civil law, which seems at one time to have been adopted by the English ecclesiastical courts, and in a great manner by their courts of equity, all conditions in restraint of marriage were regarded as illegal, and legacies were discharged of such conditions, whether precedent or subsequent.[1] But the ancient rule has been greatly relaxed in modern times; and it is now settled that conditions which do not directly or indirectly import an absolute *injunction to celibacy* are valid.[2] Thus, conditions restraining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, &c.,[3] or requiring or prohibiting marriage with particular persons, and the like, are valid conditions.

It is impossible to reconcile all the cases on the subject in question; but the better opinion seems to be that a condition in restraint of marriage without consent, under the age of twenty-one, or other reasonable age, is, like a condition in restraint of litigating the will, regarded as a declaration of the testator *in terrorem* merely, if there be no disposition over; and whether precedent or subsequent, is inoperative for the vesting or divesting of the legacy.[4]

But if there be a direction, that, in the event of a breach, or non-performance of such condition, the legacy shall go over to another legatee, the condition is valid; for the court is bound to protect the interest of the party in whose favor the ulterior limitation is made.[5] A mere residuary

doubtless, valid. It is only when so made as to work a fraud on the parents and friends, that it is objectionable. Lowe v. Peers, Burr. 2229, 2230. Key v. Bradshaw, 2 Vern. 102. But long engagements are not to be encouraged.

[1] Scott v. Tyler, 2 Dick. 720.

[2] Id. 2 Wills. Exr. 791. Bac. Abr. tit. Legacy, F. of Conditional Legacies.

[3] Stackpole v. Beaumont, 3 Ves. 89. Clifford v. Beaumont, 4 Russell's Ch. Cas. 325.

[4] Rayner v. Martin, 3 Atk. 331 by Ld. Hardwicke. Malcom v. O'Callaghan, 2 Madd. Ch. R. 353, by Sir T. Palmer. 1 Atk. 382, n. 1. Harvey v. Aston, id. 361. 1 Fonb. Eq. ch. 4, § 10, note q.

The origin of the doctrine on this subject is traced by Lord Roslyn, in Stackpole v. Beaumont, 3 Ves 96 et seq. and by Lord Thurlow, in Scott v. Tyler, 2 Dick. 716 to 721.

[5] Stratton v. Grimes, 2 Vern. 357. Wheeler v. Bingham, 2 Atk. 364.

bequest is not such a limitation over, unless the legacy be directed in case of breach of the condition to fall into the residue.[1] Different reasons have been assigned for this rule. But the most satisfactory one is that assigned by Sir William Grant, in Lloyd v. Branten, that the bequest over affords a manifestation of the intention that the condition was not merely *in terrorem*, but that the legatee over should take in that event.

A condition in restraint of marriage generally, is undoubtedly void, as against public policy, whether there be a devise over or not.[2]

A condition to marry with consent is a lawful condition, and when it is made a precedent condition, nothing vests until it is performed.[3]

The foregoing is enough for the present purpose. The subject of conditional legacies will be treated under its appropriate head.[4]

Although the defense of usury is available at law, yet there are numerous cases where the interposition of a court of equity is essential to complete relief, especially if discovery is necessary. If a lender on such contract seeks to enforce his securities in equity, and the borrower sets up usury as a defense and proves it, the securities will be declared void, and ordered to be delivered up and canceled.[5]

On the principle that he who seeks equity must do equity, it was the invariable practice of the court of chancery, unless when its practice was controlled by some positive statute, to require of the party seeking to be relieved from a usurious contract, to bring into court and offer to pay the money actually lent, with lawful interest thereon.[6]

The early New-York cases, indeed all prior to the revision of 1830, were made under the act for preventing usury, of the 8th of February, 1787,[7] and which was framed from the English statutes upon the same subject. The doctrine that he who asks relief in a court of equity must himself do equity, was applied to a complainant seeking to set aside a usurious security in the court of chancery. The subsequent cases in New-York are not intelligible without a reference to the changes introduced at different times, by our legislation on this subject. The eighth section of the title of the revised statutes, "Of the interest of money,"[8] is in these words: "Whenever any borrower of any money, goods or

[1] 2 Atk. 368. Lloyd v. Branten, 3 Meriv. 118.

[2] Bac. Abr. tit. Legacy, F.

[3] Harvey v. Aston, 1 Atk. 379.

[4] See post, "Conditional Legacies."

[5] Fanning v. Dunham, 5 J. Ch. R. 122.

[6] Rogers v. Rathbun, 1 J. Ch. R. 367. Tupper v. Powell, id. 439. Morgan v. Schermerhorn, 1 Paige, 544. 1 Fonb. Eq B. 1, ch. 1, § 3, note h.

[7] 1 R. L. 64.

[8] 1 R. S. 773.

things in action, shall file a bill in chancery for a *discovery* of the money, goods or things in action, taken or received, in violation of either of the foregoing provisions, it shall not be necessary for him to pay, or offer to pay, any *interest* whatever on the sum or thing loaned; nor shall any court of equity require or compel the payment or deposit of the *principal sum*, or any part thereof, as a condition of granting *relief* to the borrower, in any case of a usurious loan forbidden by this chapter."

Soon after this statute took effect, it received a construction in the court of chancery, and which was affirmed on appeal by the court of errors. The case arose upon a bill filed by the surety to a promissory note, against the holder, who had brought an action at law against both principal and surety for discovery and relief, and for an injunction against the suit at law. The bill contained no offer to pay the principal sum actually lent, or legal interest thereof, nor was any money deposited or brought into court. On the part of the complainant it was insisted, that under the provision of the eighth section of the act, above quoted, the defendant was not bound to pay, or offer to pay, any part of the principal, or legal interest of the money actually lent, to entitle him to an answer from the defendant, and to a decree declaring the security void. The counsel for the defendant (the plaintiff in the action on the note) contended, on the other hand, that the provisions of the section in question were only intended to deprive the lender of money upon usury of the *interest* on the sum loaned, when the borrower was compelled to resort to a court of equity for a *discovery* of the usurious contract; and also to relieve the complainant from the inconvenience of paying or depositing the sum actually due, in the first instance, as a condition of granting *relief*, by compelling a discovery and granting an injunction to stay proceedings at law in the mean time. He also contended that the section was limited to the case of a suit by the *borrower;* and was not applicable to the case, in which the complainant was not the actual borrower, but merely the *surety* for the person to whom the money was loaned. On these questions Chancellor Walworth made the following remarks: "This section of the revised statutes has undoubtedly introduced a new principle in the law of usury as administered in this court. And to ascertain its true construction it is necessary to inquire how the law previously stood, and what change the legislature intended to introduce. The usury laws having declared all bonds, bills, notes, contracts, and assurances which were contaminated with usury, void, it followed of course, that no suit could be sustained by the usurer or his assignee, either at law or in equity; even to recover back the money actually lent, with the legal interest thereon. This however, was found by the courts to be an insufficient protection

to the borrower, from his inability to establish the fact of usury by the ordinary modes of proof adopted in courts of common law. It was also found that in many cases where the borrower had the means of proving the usury, the nature of the security taken by the lender was such as to give the borrower no opportunity to plead and establish the fact in a court of law. A common case of this kind was the taking of a bond and warrant of attorney, and entering a judgment thereon; by which means the defendant was precluded from pleading the usurious consideration of the bond. And when the lender had taken a mortgage for the loan, containing the usual power of sale, he also had the right to foreclose the equity of redemption of the borrower by advertising under the statute, and without applying to any court. In these, and some other cases of a similar nature, it became necessary for the borrower to resort to the extraordinary jurisdiction of the court of chancery to obtain discovery, or relief. But when he applied to this court as a complainant, or actor, he found himself differently situated in respect to his rights under the usury laws, from what he would have been when placed in the situation of a defendant, either at law or in equity. Coming here to ask the equitable interference of this court, he was met by the standing maxim of courts of equity, that 'he that will have equity must do equity.' (Francis' Maxims, 1.) And this court could not afford him any relief against the usurious premium included in the security which he sought to set aside, except upon the terms, or conditions, that he should repay to the defendant the money actually lent, with legal interest thereon. If a discovery was necessary either to aid him in a defense at law, or otherwise, he was also met by another settled principle of this court, that it will not extort from the defendant an answer on oath, and thus compel him to be a witness against himself, when such answer might subject him to a criminal proceeding, or to a penalty or forfeiture, or to any loss in the nature of a forfeiture."

"In accordance with these two principles, it had become the settled law of the court of chancery, previous to the adoption of the revised statutes, that a defendant was not bound to answer a bill seeking a discovery as to any usurious transactions, when a disclosure of the usury would, or might, subject him to the forfeiture or loss of the whole, or any part of the money actually lent, or of the legal interest thereon. And even in cases where the complainant could establish the usury without the aid of the defendant's answer, no relief could be granted to him in this court, except upon the equitable terms, or condition, that he should pay to the defendant what was justly due. (Whitmore v. Francis, 8 Price's R. 616. Tupper v. Powell, 1 J. Ch. C. 439. Scott v. Nesbitt, 2 Cox's C. C. 183.

Fanning v. Dunham. 5 J. Ch. R. 122.) These two principles are distinct in their nature, although they were both applicable to the case of a complainant seeking discovery and relief in this court, against a usurious contract; and the last might be entirely abolished by the legislature. without interfering with any of the natural rights of the defendant, or doing any thing inconsistent with the spirit of our free institutions. The rule that this court will not lend its aid to a party to enforce a penalty or a forfeiture, and the maxim that a party coming here to ask equity must do equity relates merely to the principles upon which this court acts in the exercise of its general jurisdiction."

After conceding that it was competent for the legislature to abolish these maxims of a court of equity, provided the right of trial by jury was not infringed, and no other provision of the constitution violated, he expressed the opinion that the legislature intended to alter the principles on which a court of equity acts in setting aside usurious contracts and securities, in those cases where the complainant has the means of establishing the usury without resorting to the oath of the defendant; but to leave those principles unaltered, when the nature of the security was such as to compel the borrower to resort to a court of equity *for relief*. Hence, he says, "when the complainant wishes to examine the defendant, as a witness against himself, to establish the fact of usury, he must in his bill offer to pay the amount of principal actually due or loaned. And if the answer of the defendant can be used by a third person to avoid the security, or to relieve himself from responsibility for that amount, the complainant must also bring into court the amount claimed to be due, or must give such security as the court may direct, for the payment of the principal sum according to the offer in his bill, whenever that sum shall have been ascertained. If there is no such offer in the bill, and the subject is not of equitable jurisdiction otherwise than for the purpose of *discovery*, and an injunction to stay proceedings at law, the defendant may demur both as to the discovery and relief, on the ground that the plaintiff's remedy, if any, is at law. When a case of equity is made out by the bill which renders it necessary for the complainant to come into a court of equity for *relief*, he may waive an answer from the defendant on oath, and may proceed to establish the facts by proofs, as in other cases. When an answer on oath is not waived, the defendant may demur to so much of the discovery as relates to the charge of usury, and may answer as to the relief, as in other cases, when the complainant is entitled to relief, but when the defendant cannot make a discovery as to the facts upon which the relief is asked,

without subjecting himself to a criminal prosecution, or a penalty, leaving the complainant to establish the allegation of usury, if he can by proof."

The chancellor did not decide whether a *surety* could be treated as the borrower within the meaning of the statute.[1]

This cause went to the court for the correction of errors, where the order of the chancellor was affirmed.[2] In that court the prevailing opinion was pronounced by Mr. Justice Sutherland, who, after reviewing the history of the changes introduced by the revisers into the law of usury, says, with reference to the first part of the section, that the legislature intended to relieve the borrower from the necessity of paying the *interest* on the sum loaned, as a condition to a *discovery*, but meant to leave him with respect to the *principal* as the law was before; and that the provision in the other clause of the section, forbidding a court of equity to require or compel the payment or deposit of the *principal* sum as a condition of granting relief, applies only to cases where the complainant, although he could prove the usury without resort to the oath of the lender, has no opportunity of setting up the defense, in consequence of the nature of the securities executed by him; as for instance, *a judgment entered on bond and warrant of attorney, a mortgage with power of foreclosure under the statute*, &c. On the other point, both Mr. Justice Sutherland, who gave the prevailing opinion, and Mr. Senator Tracy, who dissented on a part of the case, concurred, that a surety is a borrower within the meaning of the law, and entitled to all the remedies and means of defense which are given to the principal.

The decision in Livingston v. Harris, *supra*, doubtless led to the passage of the act of 1837,[3] the fourth section of which is in these words: "Whenever any *borrower* of money, goods, or things in action, shall file a bill in chancery for *relief*, or *discovery*, or both, against any violation of the provisions of the title of the revised statutes, 'Of the interest of money,' or of this act, it shall not be necessary for him to pay or offer to pay any *interest* or *principal* on the sum or thing loaned; nor shall any court of chancery require or compel the payment or deposit of the principal sum or interest, or any portion thereof, as a condition of granting *relief* or compelling, or *discovering* to the borrower in any case, usurious loans forbidden by said title or by this act."

By a subsequent section[4] it was enacted that whenever it should satisfactorily appear by the admission of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security, or

[1] Livingston v. Harris, 3 Paige, 528.
[2] S. C. in Error, 11 Wend. 329.
[3] Laws of 1837, p. 486.
[4] Id. § 5.

any evidence of debt, had been taken or received in violation of the provisions of the said title or that act, the court of chancery should declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled.

Under the provisions of the act of 1837, the chancellor held that the word *borrower*, as used in the revised statutes, and in the 8th section of the act of 1837, was not confined to the person to whom the original loan was made; but embraced his sureties, heirs, devisees and personal representatives. He also held that it embraced subsequent grantees of premises subject to a usurious mortgage, who took the premises adverse to the claim of the mortgagee, but who subsequently guarantied the payment of the bond and mortgage, including the usurious premium for the loan.[1] These questions were brought into the court of errors, on appeal from the decision of the chancellor, in another case, involving the same principles, and decided about the same time, and that court concurred with the chancellor in the opinion that the word "borrower," in the statutes before mentioned, embraced not only the party to whom the original loan was made, but also his sureties, heirs, devisees and personal representatives, but differed from him with respect to its embracing subsequent grantees. Accordingly, when lands were purchased at a sheriff's sale, with knowledge that they were covered by a prior usurious mortgage, and the purchaser, after obtaining the sheriff's deed, filed a bill in equity to set aside the mortgage, to which the mortgagee demurred on the ground that it contained no allegation of payment or offer to pay the sum actually loaned, &c., it was held that the demurrer was well taken, and the bill was dismissed.[2] This was upon the principle, that the legislature had not relieved any other person save the *borrower*, and those standing in legal privity with him, from the necessity of complying with the long established practice of the court, of offering to pay the sum actually due, as a condition to the relief prayed.

The surety of the borrower is entitled to all the privileges under these acts of the borrower according to the foregoing cases. This doctrine was questioned by Bronson, J., and approved by Gardiner, J., in the court of appeals, but the point was not passed upon by the court.[3] It stands, therefore, upon the decision of the court of errors.

With regard to the validity of securities taken under usurious agreements, the English statute of the 12th Ann, stat. 2, ch. 16, enacted that all

[1] Cole v. Savage, 10 Paige, 583.

[2] Post v. The Bank of Utica, 7 Hill, 391. Post v. Dart, 8 Paige, 639.

[3] Vilas v. Jones, 1 Comst. 274.

bonds, contracts and assurances whatsoever, made for payment of any principal, or money to be lent, whereby usurious interest was taken or received, should be *utterly void*.[1] Under this statute, it was held by the English courts, that a bill or note was void for usury, even in the hands of a bona fide holder.[2] The extreme hardship of this rule led to the statute of 58 Geo. 3, ch. 93, which enacted that all bills and notes thereafter made upon usurious consideration, or contract, should not be void in the hands of an indorsee for *valuable consideration*, unless such indorsee had, at the time of discounting or paying such consideration for the same, *actual notice* that such bill or note had been originally given for a usurious consideration, or upon an usurious contract.[3] The New-York statute of 1787, for preventing usury,[4] like the English statutes of 12th Ann, made all bonds, bills, notes, contracts and assurances whatsoever, made or taken upon an usurious consideration, *utterly void*. The New-York statute specified "bills and notes," by name, which were not mentioned in the English statute, but which were held to be within it, by the courts. The English cases under the statute were authority for our courts under the statute of 1787, and were followed accordingly.[5] And this continued to be the rule until the revised statutes took effect, in 1830. By the fifth section of the act "Of the interest of money," the provisions of the English statute of 58 George 3d were adopted. After declaring all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is prescribed by the act (seven per cent) to be void; it enacts that the section shall not extend to any bills of exchange or promissory notes, payable to order or bearer, in the hands of an indorsee or holder, who shall have received the same in good faith, and for valuable consideration, and who had not, at the time of discounting such bill or note or paying such consideration for the same, *actual notice* that such bill or note, had been originally given for a usurious consideration, or upon a usurious contract.

This statute was held to have no retrospective effect, but to be operative only upon contracts subsequently made.[6] The decisions under it,

[1] Chitty on Bills, 99, Springfield ed.

[2] Low v. Waller, Doug. 735. Cuthbert v. Haley 8 T. R. 390. Ferrall v. Shaen, 1 Saund. 295. Parr v. Eliason, 1 East, 92. Chitty on Bills, 110.

[3] Chitty on Bills, 110.

[4] 1 R. S. 64.

[5] Wilkie v. Roosevelt, 3 J. C. 200.

[6] Hackley v. Sprague, 10 Wend, 173

were similar to those under the corresponding English statute. On proof that a note was usurious in its inception, it was incumbent on the holder to show that he paid a valuable consideration for it.[1] The operation of the English statute, says Mr. Chitty, seems to be, that if in an action on a bill or note, the defendant should succeed in establishing that it was founded in a usurious contract or consideration, then the plaintiff must prove that he gave value for it; and then the defendant must show that the plaintiff, nevertheless, had notice of the usury at the time he took the security.[2]

A court of equity, when applied to by the borrower, or party standing in legal privity with him, for relief against a usurious contract, declared *utterly void* by the act of 1787, and by the revised statutes of 1830, invariably refused so to declare it, except upon the terms of payment of the sum actually due, of the principal and interest of the loan. Had the invalidity of the security depended upon *actual fraud* in obtaining the instrument, as, that one instrument was fraudulently substituted for another, or that it was without any consideration, no such terms would have been imposed by the court as a condition of relief. But when there is no moral fraud in the case, and the contract is void only by reason of its contravening a rule of public policy, or a positive statute, a court of equity, it has been seen, would not interfere, and declare it void, and set it aside, except upon the terms of reimbursing the lender the sum actually due for his advances and interest.[3]

The act of New-York of 1837, so far as it declared usurious contracts void, was not more stringent than the act of 1787 and the revised statutes; but by repealing the last clause of the 5th section of the revised statutes, it left commercial paper void even in the hands of a bona fide holder, without notice.[4]

But a bill, or note, or other chose in action, valid in its inception, may be purchased at a discount beyond the legal rate of interest, although the payer indorses the note. In a case of that kind the indorser was allowed to recover against the maker, the full amount of the note;[5] but was permitted to recover against the indorser only the sum actually paid on the purchase, with interest thereon. In cases of this character, however, it is always open to inquiry, whether the transaction be a bona fide transfer and pur-

[1] Seymour v. Strong, 1 Hill, 563.
[2] Chitty on Bills, 110, 652.
[3] Livingston v. Harris, 3 Paige, 528. S. C. 11 Wend. 329, and cases before cited.
[4] Laws of 1837, p. 467. 1 R. S. 772, § 5.
[5] Cram v. Hendricks, 7 Wend. 569.

chase of the security, or a mere device, to evade the statute of usury.[1] In a subsequent case, the same principle was applied to the purchase of a bond and mortgage at a discount beyond legal interest.[2]

If the borrower has paid the money upon an usurious agreement, he may by statute, within one year thereafter, recover against the person who shall have taken or received the same, or his personal representative, the amount of the money so paid.[3] But, independently of the statute, the excess of interest may be recovered in equity, and even at law, in an action for money had and received.[4] The rule, *in pari delicto, otior est conditio defendentis*, applies only when both parties are equally guilty, as in bribery, and the like. But the statute of usury was made to protect needy and necessitous persons from the oppression of the usurer and moneyed men, who are eager to take advantage of the distress of others; while they, on the other hand, from the pressure of their distress, are ready to come into any terms, and with their eyes open, not only break the law, but complete their ruin. It is an abuse of terms to say, that he who is driven by great pecuniary distress to submit to the exactions of the usurer, is a *particeps criminis* with his oppressor.[5]

An action may be framed under the code in analogy to a bill in equity for discovery and relief against a usurious transaction. No other bill, or action of discovery has been abolished, except such as formerly was used in aid of another action.[6] Every action, whether at law or in equity may be, at the election of the plaintiff, an action for discovery and relief.[7] If the plaintiff desires the answer of the defendant to be under oath, he can require it, by verifying the complaint. If the pleadings be properly framed, the answer of the defendant, in such case, will make discovery as to the facts set forth in the complaint. And the provision in the code, that no pleading can be used in a criminal prosecution against the party, of a fact admitted or alleged in such pleading, is merely the enactment of the practice in this respect, which existed in courts of equity before the adoption of the code.[8] Whether the action be brought at law or in equity for relief against a usurious agreement, the party seeking to repudiate the agreement must pay, or offer to pay, in cases where he is not excused

[1] Cram v. Hendricks, 7 Wend. 569.

[2] Rapelye v. Anderson, 4 Hill, 472. Mitchell v. Oakley, 7 Paige, 68. Judd v. Traver, 8 Paige, 548. 21 Wend. 285.

[3] 1 R. S. 772, § 3.

[4] Browning v. Morris, Cowp. 792.

[5] 21 Wend. 285. 1 Fonb. Eq. B. 1, ch. 4, § 7 and notes.

[6] Code, § 389.

[7] Id. § 157.

[8] Livingston v. Harris, 3 Paige, 534, see opinion of Chancellor. Code, § 157

from so doing by the act of 1837, the sum actually due before he commences his action; and that fact must appear in his complaint.[1]

It was conceded in an early case, that at common law, a wager is recoverable wherein the parties have no other interest than that which they create by the wager itself.[2] But it was decided in the same case, and has been repeatedly since, that a wager which is against public policy is void, equally as if it contravened a positive law.[3] In one case before Lord Hardwick, where the defendant had won £500 of the plaintiff at backgammon, for which he some time afterwards gave the defendant a bond, and after that paid part of the money, on a bill brought to be relieved against the bond, and to be repaid the money which he had paid in part discharge of it, his lordship decreed accordingly with great clearness; and said by statute 9th Ann, all securities for money won at play are made void; consequently the payment under any security cannot be supported. That the time limited by that statute, for suing for the recovery of money paid, means money actually paid at the time it is lost, and does not extend to securities.[4]

In this state, the remedy has been in general asserted at law, under the provisions of the statutes, but there can be no doubt that the equitable jurisdiction of the court may be invoked, to vacate the securities taken for a gambling debt, or a debt originating in any transaction forbidden by the law.

We shall proceed now to the consideration of another class of cases, where the benign interposition of a court of equity may be invoked to relieve against frauds upon the rights and interests of third persons, comprising all those acts which tend to delay, hinder or defraud creditors. These acts are sometimes the result of actual, intentional and premeditated fraud, and of course relievable either at law or in equity; but they more frequently, perhaps, fall within the class of constructive frauds; being acts in contravention of the requirements of the statute, or against the policy of the law, and tending to defraud creditors and subsequent purchasers. The two classes of frauds are often found so blended together, that it is impossible to separate them, and both perhaps exist in the same

[1] Fitzroy v. Guillam, 1 T. R. 151, and the cases in Chancery already cited.

[2] Bunn v. Riker, 4 J. R. 426.

[3] Mount v. Wait, 7 J. R. 434. Dennison v. Cock, 12 id. 376. Lansing v. Lansing, 8 id. 454. Rust v. Gott, 9 Cowen, 169. Morgan v. Groff, 5 Denio, 364. S. C. 4 Barb. 524.

[4] Rawden v. Shadwell, Amb. 269. Portarlington v. Soulby, 3 Myl. & K. 104. Woodroffe v. Farnham, 2 Vern. 297.

transaction. Lord Mansfield is reported to have said, on one occasion, that the principles and rules of the common law, as now universally understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. ch. 5, and 27 Eliz. ch. 4.[1] This is perhaps stating the doctrine too broadly, as courts of equity afford relief in cases not mentioned in those statutes. And there are many instances of fraud that would affect instruments in equity, of which a court of law cannot take notice.[2]

The English statutes on the subject of frauds have been closely copied by the revised statutes of this state. The first section of title two, chapter seven, part two, R. S.[3] enacts, that all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person. This was taken from the English statute of 3d Henry 7th, ch. 4, but is made somewhat more broad and comprehensive. The 13th Eliz. ch. 5, makes all gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder and defraud creditors, void as against the persons to whom such fraud would be prejudicial. This is embraced in the first section of title three, chapter seven, of part two of the revised statutes. And the exception in the English statute, in favor of bona fide purchasers upon good consideration, without notice of the fraud, is adopted in substance and with some qualification, in the fifth section of the same title of the New-York statute.[4] The statute of the 27th Eliz. ch. 4, was made against fraudulent conveyances of lands to defeat subsequent *bona fide* purchasers, and it applied in favor of subsequent purchasers for valuable consideration, even in cases of fair voluntary conveyances, provided they were purchasers without notice of the voluntary conveyance. The corresponding provision of the New-York statute, (2 R. S. 134, §§ 1, 2,) avoids every conveyance of any estate or interest in lands, or the rents and profits of lands, and every charge upon lands, or upon the rents and profits thereof, made or created with the intent to defraud prior or subsequent purchasers for valuable consideration, of the same lands, rents or profits, as against such purchaser. The second section enacts that no such conveyance or charge shall be deemed fraudulent, in favor of a subsequent purchaser, who shall have actual or legal notice thereof, at the time of his purchase, unless it shall appear

[1] Cadogan v. Kennett, Cowp. 434. Per Marshall, Ch. J. in Hamilton v. Russell, 1 Cranch, 316, and per Spencer, J. in Sands v. Hildreth, 14 J. R. 493.

[2] Per Lord Eldon in Butcher v. Butcher, 1 Ves. & B. 98.

[3] 2 R. S. 135.

[4] 2 R. S. 137, §§ 1, 5.

that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended.

It is very properly remarked by a learned writer,[1] that the object of the legislature by the 13th Elizabeth, was to protect creditors from those frauds which are frequently practiced by debtors under the pretense of discharging a moral obligation. The want of a good or meritorious consideration to a conveyance, seems always to have been a sufficient ground to conclude that it was fraudulent. While the statute protects the legal rights of creditors against the fraud of their debtors, it excepts from such imputation the *bona fide* discharge of a moral duty. It does not declare all *voluntary* conveyances, but all *fraudulent* conveyances, to be void; and whether the conveyance be fraudulent or not, is declared to depend on the consideration being good and *bona fide*.

It is not enough that the conveyance is made upon a *good* consideration, it must also be made *bona fide*. In the New-York statute it is also provided that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers, *solely on the ground* that it was not founded on a *valuable consideration*.[2] A *good* consideration is sometimes used in the sense of a consideration valid in point of law; and then it includes a meritorious as well as valuable consideration. The meaning of the word "good" in the statute of frauds is settled to be the same as "valuable."[3] The revised statutes use the term "*valuable*" consideration. A good consideration is most generally used as denoting the consideration of blood, or of natural love and affection.[4] A deed upon a good consideration ought to prevail, unless it conflicts with the rights of creditors; in which case it should be set aside in their favor, for though the consideration be *good*, it is not *bona fide*.

When the actual design and intent of a purchase is to defraud the creditors of the vendor, be the consideration paid, or agreed to be paid, what it may, the sale is doubtless void as against creditors either at common law or under the statute. It thus becomes a purchase in *bad faith*, which no court can uphold. This principle has been extended to a purchase made with intent to defeat the recovery by a third person for damages in an action then pending for a tort, and before trial, when it could not be known with certainty, whether there would be a recovery or not.[5] But it is not of this kind of *intentional* frauds that we are now treating.

[1] 1 Fonb. Eq. B. 1, ch. 4, § 12, note.
[2] 2 R. S. 137, § 4.
[3] Hodgson v. Butts, 3 Cranch, 140. Copis v. Middleton, 2 Mad. R. 430. Twyne's case, 3 Rep. 81, b. Taylor v Jones, 2 Atk. 601.
[4] 2 Bl. Com. 297.
[5] Jackson v. Myers, 18 J. R. 425.

There is a class of cases which have led to much discussion, and to some conflict of opinion, whether a voluntary conveyance made by a party indebted at the time be *per se*, fraudulent as against the creditors of the grantor, or whether the circumstance of the indebtedness of the grantor is to be taken only as one of the badges of fraud which may be explained. This question has sometimes arisen between a creditor of the grantor and a person holding under a marriage settlement; and sometimes between such creditor and a son or daughter of the grantee, to whom the convey ance was made as an advancement.

This subject was very much considered by Chancellor Kent, in 1818, arising on the question as to the validity of a post nuptial marriage settlement.[1] After a critical review of the English cases, he came to the general conclusion that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case, said the chancellor, "does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of the creditor, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate, to *stand in the way of existing debts.* This is the clear and uniform doctrine of the cases."

With respect to the claims of *subsequent* creditors, he held that the presumption of fraud, arising from the circumstance that the party was indebted at the time, may be repelled; that it is repelled by the fact that these debts are secured by mortgage, or by a provision in the settlement; that if no such circumstance exists the subsequent creditor may show a prior indebtedness; that as to subsequent indebtedness there is no necessary legal presumption of fraud, from a voluntary conveyance; and that there must be proof of fraud in fact; and the indebtedness at the time of the conveyance, in order to be available to a subsequent creditor, must be such, in its circumstances and amount, as to justify the conclusion of fraud.

It is believed that the doctrine of the chancellor, to the extent promulgated by him, was not fully in accordance with the opinions, then entertained, by eminent judges of the supreme court. The learned jurist who delivered the opinion of the court of errors in Verplank v. Sterry,

[1] Reade v. Livingston, 3 J. Ch. Cases, 481, 500. S. P. Bayard v. Hoffman, 4 J. Ch. R. 450.

decided in 1815,[1] evidently did not consider that indebtedness alone would be sufficient to impeach a settlement in favor of existing creditors. If the voluntary settlement was made on a meritorious consideration, it was not only necessary that the grantor should be indebted, but should be insolvent, or in doubtful circumstances, at the time. In such case it is obvious that the settlement deprives the creditors of the means of satisfying their debts, and the case plainly falls within the statute; but if the grantor be not indebted to such a degree as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors.

In the case of Verplank v. Sterry, supra, the question was raised by a subsequent purchaser, but the learned judge, after adverting to the English cases, evidently thought that subsequent purchasers stood on the same footing as subsequent creditors, with respect to their right to impeach a voluntary settlement.[2]

But whether the doctrine of Chancellor Kent, in Reade v. Livingston, was in accordance with the judicial opinions of his cotemporaries or not, it was at length in 1825 fully approved and adopted by the supreme court in Jackson v. Seward.[3] In that case, the lessor of the plaintiff deduced title under a judgment and execution against the father, and the defendant, under a deed from the father, made before the recovery of the judgment or the commencement of the action in which it was obtained. The question of actual fraud in the conveyance was not relied upon, and a verdict was taken for the plaintiff subject to the opinion of the supreme court upon the single question, whether the deed was fraudulent in law, as against the lessor of the plaintiff.

After a full discussion of the subject, the supreme court adopted the reasoning of Chancellor Kent in Reade v. Livingston. They held that a voluntary settlement, or conveyance by way of advancement of children, after marriage, by a person indebted at the time, is fraudulent and void against all his creditors, who were such prior to the settlement or advancement; and that without regard to the amount of their debts, or the extent of the property settled, or the circumstances of the person who made the settlement or advancement. They thought it was as well applicable to a debt due upon a contingent liability, as for a debt then actually due; but with regard to debts contracted subsequently to the

[1] Per Spencer, J. in Verplank v. Sterry, 12 J. R. 557.

[2] Id. p. 556.

[3] 5 Cowen, 67.

settlement, or advancement, the presumption of fraud, they thought, might be repelled by circumstances.

The case of Jackson v. Seward was taken to the court of errors; and in the subsequent year (1826) underwent a most elaborate discussion by the, then, Chancellor Jones, and Senator Spencer, when the judgment of the supreme court was reversed by nearly a unanimous vote.[1] On this branch of the case the chancellor, after questioning the doctrine of Chancellor Kent in Reade v. Livingston, adopts the language of Mr. Justice Thompsen in Hinde's Lessees v. Longworth.[2] "A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount, would not make the deed fraudulent, if it could be shown, that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the grantor's debts. The want of a valuable consideration may be a badge of fraud, but is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side."

Other combinations of circumstances might produce the same effect, in repelling this presumptive evidence of fraud. It would be the duty of the court, before it pronounced its judgment, to look at the whole case, to determine whether the deed from the father to the son was voluntary or for a consideration; and, if voluntary, how far the other facts of the case would repel the presumption of fraud, which the character of the conveyance would create.

The opinion of Senator Spencer was no less decided on the doctrine in question. He treated the case as if the jury had found specially that there was no actual fraud. This was doubtless the true ground on which to place the case. The question then became, on this branch of the case, whether a voluntary conveyance by a father to a child is in law fraudulent as against creditors, or only evidence of fraud to be passed upon by the jury. He held that it was not *conclusive* evidence of fraud, but was a fact to be submitted, with other circumstances, to the consideration of the jury.

A *voluntary* conveyance is a deed without *any* valuable consideration.[3] The *adequacy* of the consideration is another matter, and becomes mate-

[1] Seward v. Jackson, 8 Cowen, 406, 422.

[2] 11 Wheat. 199, 213; and see Sexton v. Wheaton, 8 id. 229, 242.

[3] Per Spencer, in Seward v. Jackson, 8 Cowen, 430. Jackson v. Peck, 4 Wend. 300.

rial only in ascertaining the fraudulent intent. Strictly speaking, says Spencer, senator, in the same case, there is no such thing as fraud in law; fraud or no fraud is, and ever must be, a fact; the evidence of it may be so strong as to be conclusive; but still it is evidence, and as such must be submitted to a jury. No court can draw it against the finding of a jury.[1]

The lessor of the plaintiff having thus failed at law, filed his bill in the court of chancery to set aside the deed in question, on the ground of its being a voluntary conveyance from the father to the son, without consideration, and fraudulent as respects the complainant, a creditor of the grantor. The cause was decided in the first instance by the vice chancellor of the first circuit,[2] who after a careful examination of the subject dismissed the bill, mainly upon the ground that the matter was *res adjudicata*, by the decision of the court of last resort in Jackson v. Seward, in eighth Cowen. The cause then went by appeal into the court of chancery, where it was thoroughly argued. In examining the question under consideration, the chancellor said that it could not be seriously urged that when a parent makes an advancement to his child, honestly and fairly retaining in his own hands at the same time, property sufficient to pay all his debts, such child will be bound to refund the advancement, for the benefit of creditors, if it afterwards happens that the parent either by misfortune or fraud does not actually pay all his debts which existed at the time of the advancement. And he adds: when a parent makes a voluntary gift or conveyance of his property without any valuable consideration, and for the purpose of defrauding creditors, equity may well follow it into the hands of the donee for the benefit of the creditors, although such donee was not privy to the intended fraud.[3] The cause was then taken by appeal to the court of errors, where the decree of the chancellor was affirmed, apparently upon the ground that the doctrine of the court of errors, established in the same controversy, in the eject ment suit, was decisive of the case.[4]

The fact that other questions than the one under consideration, existed and were noticed by the members of the court of errors, when the case of Jackson v. Seward was before them, as reported in eighth Cowen, has cast some doubt as to the extent to which the doctrine of Chancellor Kent, in Reade v. Livingston, has been shaken. The opinions, on this point,

[1] Per Spencer, in Seward v. Jackson, 8 Cowen, 430. Jackson v. Peck, 4 Wend. 300.

[2] Van Wyck v. Seward, 1 Ed. Ch. 327

[3] Van Wyck v. Seward, 6 Paige, 67

[4] S. C. 18 Wend. 376.

by the supreme court, in subsequent cases, become therefore important to be examined. In a case which arose shortly after the decision of the court of errors, the same question was again brought under discussion.[1] On this branch of the subject, Sutherland, J., in delivering the opinion of the court, said: The doctrine of voluntary conveyances has recently been very fully considered in the court of errors, in the case of Seward v. Jackson,(8 Cowen, 406,) and the distinction which had previously been supposed to exist between fraud in law and fraud in fact or actual fraud, appears to have been entirely exploded. The language of Judge Thompson in Hinde's Lessees v. Longworth, (11 Wheaton, 213,) and which has already been quoted,[2] is cited by Chancellor Jones and Senator Spencer with marked approbation, as containing a clear and sound exposition of the law upon this subject. The language of the learned judge in that case, it will be remembered, makes the question of fraud or no fraud in a voluntary conveyance from the parent to a child, upon the consideration of natural love and affection, a question of fact for the jury, and not of law for the court; and that it treats the indebtedness of the father at the time, not as conclusive evidence of fraud, but as a badge of fraud, open to explanation, and capable of being repelled by circumstances. The same question arose in the same court in a still later case,[3] and was decided the same way.

The same question has also arisen in the court of chancery since the decision in Jackson v. Seward, and Van Wyck v. Seward. In Wickes v. Clarke, a bill was filed by judgment creditors of the husband to set aside a post nuptial settlement by the husband upon his wife of property which came to her by descent from her uncle, upon the ground that it was voluntary and not upon any valuable consideration. The cause was heard by the vice chancellor of the first circuit. On this branch of the subject the vice chancellor said: The doctrine that a voluntary settlement after marriage by a person indebted at the time, is in law presumed to be fraudulent and void against all such antecedent creditors, without regard to the amount of existing debts, or the extent of the property settled, or the circumstances of the party; and that no circumstances will permit such debts to be affected by the settlement, or repel the legal presumption of fraud, as stated by Chancellor Kent in Reade v. Livingston, as being the result of the English cases, and reiterated by him in Bayard v. Hoffman, (4 J. Ch. R. 450,) has undergone some modification since. by the decision of the court of errors in Seward v. Jackson, (8 Cowen, 406.)

[1] Jackson v. Peck, 4 Wend. 303.

[2] Ante, p. 230.

[3] Jackson v. Zimmerman, 7 Wend. 48.

To authorize the court to interfere with and declare a voluntary settlement void, even as to creditors whose debts existed when the deed was made, *intentional fraud* must appear; and *prior indebtedness* is but a *badge* or *argument* of fraud, which may be explained away or repelled by circumstances.[1] Although the decree of the vice chancellor was modified by the chancellor, it was not upon a point which affects the correctness of that portion of his opinion.

When the case of Van Wyck v. Seward was in the court of errors on appeal from the chancellor, Mr. Justice Bronson gave an elaborate and able opinion, in which thirteen senators concurred, in favor of reversing the decision of the chancellor. His opinion was based upon several other points, not necessary to be noticed at this time, but on the question whether the doctrine of Chancellor Kent, in Reade v. Livingston, *that if the party be indebted at the time of the voluntary settlement, it is to be presumed to be fraudulent in respect to such debts, and that no circumstances will permit those debts to be affected by the settlement, or repel the legal presumption of fraud*, be law, the learned judge remarks: "that the rule has not always been carried to that extent, and he was not prepared to say, that the language of the chancellor should not be taken with some qualifications."[2] Judge Story, in his learned commentaries on equity jurisprudence, reviews, with his accustomed industry and ability, the cases on this subject, and speaking of the doctrine of Chancellor Kent in Reade v. Livingston, says, that it is *strictissimi juris*. And he settles down upon the conclusion under the statute of the 13th Eliz., that mere indebtedness at the time, would not, *per se*, establish that a voluntary conveyance is void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors.[3] And Chancellor Kent, in a note to his commentaries, admits that the tendency of the decisions, both in England and America, is in the same direction, that the conclusion of fraud is, in every case, to be left to a common jury.[4]

From the foregoing review of the New-York cases, it may be affirmed, that indebtedness alone, without reference to its amount and other circumstances, will not render a voluntary conveyance by a parent to a child, fraudulent and void as against existing creditors, and much less against subsequent creditors; that if a parent, indebted at the

[1] Wickes v. Clarke, 8 Paige, 165. See S. P., The Bank U. S. v. Houseman, 6 Paige, 526.

[2] Van Wyck v. Seward, 18 Wend. 392.

[3] Story's Com. Eq. Juris. § 360, 365.

[4] 2 Kent's Com. 442, note.

time, makes an advancement to a child, and retains in his own hands at the same time, property sufficient to pay all his debts, the child will not be bound to refund the advancement for the benefit of creditors, should it afterwards happen that the parent, either by misfortune or fraud, does not actually pay all his debts which existed at the time of the advancement.[1] If it be shown that the grantor was in prosperous circumstances and unembarrassed, though indebted, and that the gift to the child was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of the grantor, these circumstances, in the absence of proof of an actual intention to defraud, will repel the inference of fraud resulting from the want of a valuable consideration. The want of such consideration may be, and doubtless is, a badge of fraud, but it is only presumptive and not conclusive evidence, and may be met and rebutted by evidence on the other side.

This doctrine it has been seen is in conformity to the construction of the statute of 13 Elizabeth by the supreme court of the United States.[2]

It is not denied that there are numerous English cases sustaining the doctrine of Chancellor Kent in Reade v. Livingston. They are ably reviewed by him and by Judge Bronson in the dissenting opinion in Van Wyck v. Seward, in the 18th Wendell. The English courts hold the rule more strictly in favor of subsequent purchasers, than in favor of creditors. Thus, in one case it was held, that a voluntary settlement of lands made in consideration of natural love and affection is void as against a subsequent purchaser, for a valuable consideration, though with notice of the prior settlement; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction.[3] This case adopts a more severe rule than has ever been followed in this state. It was shown by Judge Spencer in Verplank v. Sterry,[4] that the rule with respect to subsequent purchasers stands in principle, upon the same footing as the rule as to creditors. In this state, it is a waste of time to review the cases on this point, since the revised statutes have removed the distinc-

[1] Van Wyck v. Seward, 6 Paige, 67.

[2] Hinde's Lessees v. Longworth, 11 Wheat. 213. Sexton v. Wheaton, 8 id. 229, 230. Verplanck v. Sterry, 12 J. R. 536, 556 558, per Spencer. 2 R. S. 137, § 4, which makes the question of a fraudulent intent, a question of fact for a jury; and enacts that no conveyance or charge shall be adjudged fraudulent against purchasers or creditors, solely on the ground that it was not founded on a valuable consideration.

And see also Frazer v. Western, 1 Barb. Ch. R. 220. Jackson v. Post, 15 Wend. 588. Plank v. Schermerhorn, 3 Barb Ch. R. 644.

[3] Doe v. Manning, 9 East, 59

[4] 12 J. R. 558.

tion between them, if any in truth existed, and placed both on the same footing.[1]

The doctrine of the supreme court of the United States, and of the courts of this state on the subject of the claims of creditors against voluntary settlements, is in accordance with that of Lord Mansfield. In one case where the contest was between a creditor and the party holding under a voluntary settlement,[2] his lordship said, such a construction of the statute of 13 Eliz. is not to be made in support of creditors, as will make third persons sufferers. Therefore, the statute does not militate against any transaction *bona fide*, and when there is no imagination of fraud. And so is the common law. But if the transaction be not *bona fide*, the circumstance of its being done for a *valuable consideration* will not alone take it out of the statute. And in another case where the question arose between a *purchaser*, and a party claiming under a settlement,[3] his lordship said, the statute does not say a *voluntary* settlement shall be void, but that a *fraudulent* settlement shall be void. There is no part of the act of parliament, which affects *voluntary* settlements *eo nomine* unless they are *fraudulent*. To be sure, he says, it is very difficult against fair honest creditors to support a voluntary settlement, and in another place he says, one great circumstance which should always be attended to in these transactions, is, whether the person was *indebted* at the time he made the settlement; if he was, it is a strong *badge* of fraud. But he nowhere asserts that the existence of an indebtedness, without reference to its amount, affords a conclusive presumption of fraud.

The more recent decisions in England, it has already been said, are vibrating towards those made nearest to the time of the statute. In one of the late cases,[4] Lord Langdale said he could not think the real and just construction of the statute warranted the proposition that the existence of *any debt* at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the court to set aside a voluntary conveyance under the statute of Elizabeth. A man may intend to pay every debt as soon as it is contracted, and constantly use his

[1] 2 R. S. 137, § 4. Reviser's notes on this section, 3 id. 658, 2d ed. It was said by Gould, J. in Salmon v. Bennett, 1 Conn. R. 557, that purchasers have always been more favored in the construction of the statute 27 Eliz. than creditors under the 13 Eliz. Purchasers not having trusted to the personal responsibility of the grantor, but having advanced their money only upon a conveyance of the *specific* property in controversy, and in confidence of acquiring an immediate title to it, are regarded as having a higher equity than general creditors.

[2] Cadogan v. Kennett, Cowp. 434.

[3] Doe v. Routledge, id. 705.

[4] Townsend v. Westacott, 2 Beav. 344.

best endeavors, and *have ample means to do so*, and yet be frequently indebted in some small sum; there may be a withholding of claims, contrary to his intention, by which he is kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand, he thought it inconsistent with the principles of the act, and with the judgments of the most eminent men, to require something amounting to insolvency to be proved in order to set aside a voluntary conveyance. It seems to follow from this reasoning, that in his lordship's opinion, the indebtedness of a man who has ample means to pay all his debts, lays no foundation alone for presuming fraud. To raise that presumption there must be a larger indebtedness, though not a present insolvency; but an indebtedness so disproportionate to his means as to raise the inference of bad faith, in the voluntary conveyance.

The doctrine held by the supreme court of errors of Connecticut in a case decided in 1816, coincides with that at present held in this state.[1] In that case, where a conveyance was made to a child, in consideration of natural affection, without any fraudulent intent at a time when the grantor was free from embarrassment, the gift constituting but a small part of his estate and being a reasonable provision for the child, it was held that such conveyance was valid against a creditor of the grantor, whose claim existed when the conveyance was made.

The learned chief justice in delivering the opinion of the court said: "In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy: When there is no actual fraudulent intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of the grantor's debts; then such conveyance will be valid against conveyances existing at the time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed, at the time, and on the eve of a bankruptcy; or if the value of the gift be unreasonable considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors." And Gould, J. said, "As to creditors, the

[1] Salmon v. Bennett, 1 Conn. R. 525.

want of a valuable consideration may be under circumstances, a *badge* of fraud; but does not *per se*, render the conveyance fraudulent."[1]

There is a question which has been agitated in the English courts, whether the statute of 13 Eliz. extends to voluntary settlements of property which a creditor could not reach by a common law execution, such as choses in action, bank stock and the like; and the opinion seems to be that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property, liable to be taken in execution.[2] The difficulty of reaching that species of personal property was discussed and considered by Chancellor Kent in Bayard v. Hoffman.[3] The cases were found to be contradictory, and the question unsettled. The early cases in the time of Lord Hardwicke favored the doctrine, that personal property, not tangible by an execution at law, could be reached by the assistance of a court of equity. The later cases, in the time of Lord Thurlow and Lord Eldon, were the other way. In a subsequent case,[4] a judgment creditor who had issued an execution which had been returned nulla bona, was held to have acquired a priority of right to the property of his debtor, in the hands of a trustee, and was thus aided by the court in obtaining satisfaction of his judgment out of property which could not have been seized by the sheriff. That case was affirmed on appeal by the court of errors.[5] The doctrine of that case was limited to cases of fraud, or trust, &c. by the subsequent case of Donovan v. Finn.[6] But the New-York Revised Statutes of 1830 enacted the principle contained in Hadden v. Spader, and conferred upon the court of chancery ample power over the choses in action of the judgment debtor, in favor of the creditor who had exhausted his remedy at law.[7] Under this provision, it has become the practice of a court of equity to decree satisfaction of the plaintiff's debt out of any personal property, money or things in action, belonging to the

[1] It is not deemed expedient to pursue this branch of the subject more at large. He who wishes to examine it more fully will find the cases collected, and many valuable remarks, in 1 Fonb. Eq. B. 1, ch. 4, § 12, and notes. He will find the cases cited and relied on by Kent, Ch., in Reade v. Livingston, 3 J. Ch. 500, collated and reviewed in a note to Story's Eq. Juris. under § 363, and a doubt expressed whether they fully sustained the doctrine of the chancellor in that case. Also, see 2 Kent's Com. 440 et seq. and notes, and 4 id. 463.

[2] Atherly on Marriage Settlements, 220. 1 Rob. on Fraud. Conv. 421, 422 Dundas v. Duten, 1 Ves. jr. 196.

[3] 4 J. Ch. R. 450.

[4] Spader v. Davis & Hadden, 5 id. 280.

[5] Hadden v. Spader, 20 J. R. 554.

[6] 1 Hopk. 59.

[7] 2 R. S. 173, §§ 38, 39.

defendant, or held in trust for him, whether the same were originally liable to be taken in execution or not. The code of procedure, moreover, has given a far wider scope to an execution upon a judgment against the property of the debtor, than existed formerly. It authorizes the seizure by the sheriff, not only of tangible property, but also of money, things in action, and evidences of debt.[1] And it has provided stringent and summary proceedings for reaching the equitable interests of the debtor, and making them available to the creditor.[2]

As the reason on which the English courts have declined interfering in favor of the creditor, with respect to property not liable to be seized under an execution, at common law, do not exist in this state; and as the right of the creditor to reach the debtor's choses in action, either by his execution directly, or by the aid of the equitable powers of the court, is perfect, it would seem that a fraudulent conveyance of *choses in action* should stand on the same footing as a fraudulent assignment of any other property. Such assignment forms as much an obstruction to the remedy of the creditor, as an assignment of tangible property. And accordingly, in this state, before the revised statutes, the weight of authority was in favor of reaching, through the aid of a court of equity, the property of the debtor which could not be taken on an execution at law, after the ordinary remedy at law was exhausted.[3]

The non-existence of any bankrupt laws in this state, the inefficiency of the insolvent laws, and the abolition of imprisonment for debt in 1831,[4] rendered it necessary, in order to protect the rights of creditors, that some more efficient mode, than existed at common law, should be devised for reaching the equitable rights of the debtor, and to make them available to the creditor. The revised statutes, indeed, preceded the act to abolish imprisonment for debt, but the latter was doubtless anticipated when the provisions of the former were framed, relative to the seizure of rights in action. We accordingly find, that subsequent to the revised statutes, and especially after imprisonment for debts was abolished, the aid of a court of equity was very extensively used in favor of creditors,

[1] Code of Procedure, §§ 289, 463.

[2] Id. § 292 et seq.

[3] Spader v. Davis, 5 J. Ch. R. 280, affirmed in error, 20 J. R. 554. McDermott v. Strong, 4 J. Ch. R. 687. Williams v. Brown, id 682. Brinkerhoff v. Brown, id. 671. Egbert v. Pemberton, 7 id. 207. Candler v. Petit, 1 Paige, 168, following Taylor v. Jones, 2 Atk. 600. Edgell v. Haywood. 3 id. 352. But see Donovan v. Finn, Hopk. 59, limiting the doctrine to cases of fraud, trusts, &c. Chancellor Walworth evidently preferred the doctrine as settled by Lord Hardwicke to that as modified by Lord Thurlow and Lord Eldon.

[4] Laws of 1831, p. 396.

whose executions at law were returned unsatisfied, in whole or in part. So far from being confined to avoiding conveyances of tangible property, it was more frequently employed in aiding the creditor, in reaching property which an execution at law could not take. The judgment creditor was held to acquire a specific lien upon the equitable property which belonged to the defendant, at the time of filing his bill, or upon the proceeds thereof.[1]

A court of equity enabled the judgment creditor to reach the defendant's residuary interest as a copartner in the effects of the firm;[2] to reach the husband's interest as tenant by the curtesy initiate, in a fund produced by a sale in partition of his wife's interest in land;[3] to reach a right of dower, before the same had been set out and while it was still a right in action merely;[4] to reach an annuity given by will in lieu of dower;[5] and an absolute legacy, though the will declared it should not be liable for the legatee's debts;[6] to reach the rents and profits of the debtor's real estate sold upon execution, for the fifteen months' possession after the sale to which he was entitled by law;[7] and an interest as next of kin in the personal estate of a decedent;[8] to reach the debtor's interest in a contract for the purchase of land;[9] to reach the interest of a vendee who had paid for the land;[10] to reach the beneficial interest of the debtor in the income of a fund for his support, under a valid trust created before the revised statutes; but not to the principal, or any part of the principal of the fund.[11] These principles remain unchanged by any subsequent legislation.

But there are some things which could not be reached, and which can not now be reached, by the aid of a court of equity. Thus, for example, the creditor cannot reach by a creditor's bill, a salary not yet earned and due, but he can reach a salary earned before filing the bill, though not payable.[12] He cannot reach a right of action for a conversion of property exempt from execution, nor for a personal tort; but he can reach such right of action, for the destruction or injury of property liable to execution;[13] he cannot reach a mere possibility, as a right one may ac-

[1] Eager v. Price, 2 Paige, 333. Corning v. White, 2 id. 567. Fitch v. Smith, 10 id. 9. See Lynch v. Utica Ins. Co 18 Wend. 236, as to the preference given to judgment creditors over the assignee of the debtor.

[2] Eager v. Price, 2 Paige, 333.

[3] Ellsworth v. Cook, 8 id. 643.

[4] Tompkins v. Fonda, 4 id. 448. Stewart v. McMartin, 4 Barb. 438.

[5] Degraw v. Classon, 11 Paige, 136.

[6] Hallett v. Thompson, 5 id. 583.

[7] Farnham v. Campbell, 10 id. 598.

[8] McArthur v. Hoysradt, 11 id. 495

[9] Ellsworth v. Cuyler, 9 id. 418.

[10] Watson v. Le Row, 6 Barb. 481.

[11] Bryan v. Knickerbocker, 1 Barb Ch. R. 409.

[12] Browning v. Pettis, 8 Paige, 568.

[13] Hudson v. Plets, 11 id. 180.

quire in an estate as next of kin ;[1] nor can he reach personal property of the deceased in the hands of the next of kin ;[2] nor real estate, nor equitable interests descended to the heirs.[3]

Although the act to abolish imprisonment for debt[4] and the code of procedure contain[5] provisions for a summary proceeding against the debtor, on the return of an execution unsatisfied, in whole or in part, to compel the application of his property and rights in action to the judgment, yet these provisions are merely cumulative and not exclusive; and do not take away the right of the creditor to resort to a court of equity for relief. When the amount of the debt is small, and the transaction is not complicated, the summary remedy thus provided, is adequate and satisfactory. But the obstructions to the claims of the creditor are sometimes so artfully contrived, and surrounded by such plausible appearances of fairness, that they cannot be effectually encountered and removed but by the agency of a court of equity. An action, in the nature of a creditor's bill, is still as important and necessary as it was before the code, and the principles of equity on which that bill was based, remain now, as heretofore, an essential part of our system of remedial justice.

A voluntary conveyance, though void as against creditors and bona fide purchasers, is still good between the parties, and their personal representatives.[6] As between the parties, they are expressly excluded from the operation of the statute, and are left as they stood at the common law. Before the statute, the heir could never set up his title against the voluntary alienee of his ancestor, nor call upon him for contribution, when both were amenable to the creditors of the ancestor as tertenants; nor would courts of equity assist the party making a voluntary conveyance, or his representative claiming as such, by setting them aside.[7] But since the revised statutes, an executor or administrator may, for the benefit of the creditors of their testator or intestate, avoid a sale or assignment of the party whom they represent, made to defraud creditors.[8] In this respect, with us, the executors and administrators represent the rights of creditors, in like manner as the assignee of a bankrupt, or of an insolvent debtor.[9]

[1] Smith v. Kearny, 2 Barb. Ch. R. 533.
[2] Wilber v. Collier, id. 427.
[3] Id.
[4] Laws of 1831, p. 396.
[5] Code of Procedure, 292 et seq.
[6] Jackson v. Garnsey, 16 J. R. 189. Jackson v. Caldwell, 1 Cowen, 622.
[7] Id. Osborne v. Moss, 7 J. R. 161. Randall v. Philips, 3 Mason's R. 378.
[8] Babcock v. Booth, 2 Hill, 181. Doz v. Backenstose, 12 Wend. 543. McKnight v. Morgan, 2 Barb. S. C. R. 171.
[9] Doe v. Ball, 11 M. & W. 531

We pass now to another class of assignments, or conveyances, either absolute or by way of mortgage, which a court of equity will aid creditors or subsequent purchasers in good faith, to avoid on the ground either of actual or constructive fraud. Such conveyances may be void because made with the intent to defraud; and they may be void as against creditors, without proof of moral fraud, if they fail to conform to the requirements of the common law, or the provisions of the statute. Cases of *intentional* fraud are not now under review. The points which have most frequently been litigated, with respect to the validity, as against creditors, of assignments of personal property, have arisen on the continued possession of the grantor, subsequent to the sale, and the want of consideration.

The early cases in New-York, treated the non-delivery of goods at the time of the sale or mortgage, as only *prima facie* evidence of fraud, and susceptible of explanation.[1] In a later case, decided in 1812, the subject underwent a more thorough examination, and the English and American cases were extensively collected and reviewed by the then Chief Justice Kent.[2] And he came to the conclusion that a voluntary sale of chattels, with an agreement either in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to, and approved of, by the court, fraudulent and void as against creditors. He considered fraud as a question of law, when there was no dispute about the facts. He termed it the judgment of the law on facts and intents. This case was professedly based upon Edwards v. Harben, (2 T. R. 587;) (Hamilton v. Russell, 1 Cranch, 309;) and those of a kindred character. In a case decided by the supreme court in 1821, Chief Justice Spencer spoke of the retaining possession by the vendor as indicative of fraud, and thus leaving it uncertain whether the want of a change of possession was *prima facie* or *conclusive* evidence of fraud.[3] And in a later case, decided in 1824, Chief Justice Savage treated the retaining of possession by the mortgagor or vendor, as only *prima facie* evidence of fraud, and open to explanation;[4] a doctrine to which he ever afterwards adhered.[5]

The fluctuating state of the decisions upon this, and some other points, in relation to sales, led the legislature, at the time the statutes were undergoing a revision, to put the question at rest by legislative enactment. And

[1] Beals v. Guernsey, 8 J. R. 446. Barrow v. Paxter, 5 id. 258.

[2] Sturtevant v. Ballard, 9 id. 337.

[3] Ludlow v. Hurd, 19 id. 222.

[4] Bissell v. Hopkins, 3 Cowen, 188.

[5] Divver v. McLaughlin, 2 Wend. 596. Hall v. Tuttle, 8 id. 378. In the latter case is an able and extensive review of the cases on this subject.

for this purpose they enacted, that every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.[1] A subsequent section makes the question of fraudulent intent, in all cases under the provisions of that chapter, a question of fact and not of law; and forbids that a conveyance or charge should be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.[2] And another section[3] provides that the title of a purchaser for a valuable consideration, shall not be affected or impaired, by the provisions of this chapter, unless it shall appear, that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

The object of the statute was, as can be gathered from the notes of the revisers, to adopt the doctrine of Chief Justice Kent, in Sturtevant v. Ballard, and to substitute an artificial presumption of fraud, arising from the continued possession of the vendor or mortgagor, for the proof of actual fraud; and to make that presumption *conclusive* evidence of fraud, unless the person claiming under the sale or assignment should make it appear that the same was made in good faith, and without any intent to defraud creditors or purchasers. The burden of proof, in a case falling within the statute, was thus shifted from the creditor, who at common law would have had to establish the fraud, to the party claiming under the sale or mortgage, who was now required to repel the presumption of fraud, arising from an unchanged possession of the subject, by proof of good faith and an absence of an intention to defraud.[4] So far as the statute introduced a new rule of evidence, it was an innovation upon the common law.

A distinction had formerly been held to exist between an absolute sale,

[1] 2 R. S. 136, § 5.
[2] Id. p. 137, § 4.
[3] Id. § 5.
[4] Gardner v. Adams, 12 Wend. 299 per Savage, Ch. J.

and a sale by way of mortgage, and a more strict rule with regard to the necessity of a change of possession was adopted in the former than in the latter case.[1] This distinction was abrogated by the statute; and an absolute sale, and a sale or assignment by way of mortgage, were placed upon the same footing.[2]

Although the statute was intended by the legislature to put an end to the various questions which had so long been agitated in the courts, on this fruitful subject of litigation, yet experience has shown that that desirable object has not been accomplished. And it is believed that the decisions of the courts have been more fluctuating and contradictory since, than they were before the statute was enacted. A history of the decisions on this subject, would perhaps be interesting and instructive, but it does not seem to be appropriate to a treatise on equity jurisprudence. There can be no doubt that a court of equity can afford relief against a fraudulent sale or mortgage of chattels in all cases, remediable at law, and in many cases, in which a court of law is inadequate to afford redress. As equity in general follows the law, it may be expedient to say, that the present course of the decisions of the New-York courts of law, with respect to the effect of the continuance of the possession of the vendor or mortgagor, after the sale or mortgage, is, that it is merely evidence of fraud, which may be explained; that the explanation must be passed upon by the jury; and that it is not competent for the court to direct them to find fraud, at all events, from the non-delivery of the property alone. But it is their duty to instruct them, that the continuance of possession of the vendor or mortgagor, is a circumstance from which they may find fraud, if such continued possession be not satisfactorily explained.[3]

[1] Barrow v. Paxton, 5 J. R. 258. Bissell v. Hopkins, 3 Cowen, 166. Marsh v. Lawrence, 4 id. 461. Ferguson v. The Union Fire Ins. Co. 9 Wend. 345.

[2] 2 R. S. 136, § 5.

[3] Hall v. Tuttle, 8 Wend. 375. Cole v. White, 26 id. 511. Stodard v. Butler, 20 id. 507. Hanford v. Artcher, 4 Hill, 271. Vance v. Philips, 6 id. 533. Smith & Hoe v. Acker, 23 Wend. 653. Butler v. Miller, 1 Comst. 496. Griswold v. Sheldon, 4 id. 597, per Mullett, J. concurred in by Gardiner, Paige and Gray, Justices.

See contra, Doane v. Eddy, 16 Wend. 522. Randall v. Cook, 17 id. 53. Beckman v. Bond. 19 id. 444.

The decisions of the English courts have undergone a like fluctuation since Edwards v. Harben, 2 T. R. 587; and according to the later cases, the rule seems to be, that the question of fraud, arising from the retention of possession, on a sale or mortgage of chattels, is not an absolute inference of law, but one of fact for the jury; and if the personal chattels savor of the realty, no presumption of fraud will arise from the want of delivery. And in *all cases*, the inference of fraud arising from the want of an actual delivery and continued change of possession may be rebutted, by explanations showing the transaction to be fair and honest. See Steward v. Lombe

The distinction between absolute sales and mortgages of chattels having been abolished by the revised statutes so far as relates to the necessity of a change of possession, and the latter having been to a considerable extent adopted as a mode of security, it was found necessary, in order to give publicity to the transaction, and to prevent subsequent purchasers and creditors, in good faith, from being defrauded, that such mortgages should be filed in the clerk's office of the town in which the mortgagor resided. It was accordingly enacted in 1833,[1] that every mortgage, or conveyance, intended to operate as a mortgage of goods and chattels thereafter made, which should not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, should be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, should be filed as directed by the act. If the mortgagor be a resident of the state, the statute requires that the mortgage shall be filed in the town where he resides; if he be not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution thereof. In the city of New-York such instrument is required to be filed in the office of the register of the city. In the other cities, and in the several towns of the state in which a county clerk's office is kept, in such office; and in each of the other towns in this state in the office of the town clerks thereof; and such register and clerks were required to file such instruments aforesaid when presented to them respectively for that purpose, and to indorse thereon the time of receiving the same, and to deposit the same in their respective offices, to be kept there for the inspection of all persons interested. In a subsequent section, it is enacted that every mortgage filed in pursuance of the act, shall cease to be valid as against the creditors of the persons making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall again be filed in the office

Brod. & Bing. 506. Kidd v. Rawlinson, 2 Bos. & Pul. 59. Watkins v. Burch, 4 Taunt. 823. Lady Arundell v. Phipps, 10 Ves. 145. Wooderman v. Baldock, 8 Taunt. 676. Leonard v. Baker, 1 Maule & Selw. 251. Joseph v. Ingraham, 8 Taunt. 838. Dawson v. Wood, 3 id. 256. Reed v. Blades, 5 id. 212. Storer v. Hunter, 3 Barn. & Cress. 368. Martindale v. Booth, 3 Barn. & Adolph. 498.

[1] Laws of 1833, p. 402, ch. 279.

of the clerk or register aforesaid, of the town or city where the mortgagor shall then reside.

The statute of 1833 does not repeal the provisions of the revised statutes as to the sale or assignment by way of mortgage of goods and chattels.[1] It adds thereto another ground on which, if the contingency happen, such mortgage is declared void as against creditors.[2] The object of filing the mortgage, as was said by Mullett, J. in one case,[3] is to give notice of its existence to all persons who choose to inspect it, and, when properly filed it is legal presumptive notice, binding on all persons interested.

If there be a defect in the filing of the mortgage, or the filing of it be entirely omitted, a creditor who has actual notice of such mortgage, cannot impeach the validity on the ground of such omission.[4] The *actual* notice, is equivalent to the *constructive* notice, provided for by the statute. But when such mortgage was taken upon a stock of goods, and was written in a book lettered "Day book," containing an inventory of the goods and store accounts, and deposited in a desk in the clerk's office where personal mortgages were kept in pigeon holes, it was left in doubt by the court of appeals,[5] whether it was a filing of the mortgage within the act.

Although it be a general maxim that equality among creditors is equity, yet the courts have reluctantly held that an insolvent debtor, making an assignment of his property for the payment of his debts, may give the preference to one creditor over another, in cases where he is not prohibited from doing so, by the provisions of a bankrupt or insolvent law.[6]

But to make an assignment valid, it should devote the whole of the property of the assignor to the payment of his debts, without clogging it with any terms or conditions, or making any provision for himself, which will impair the rights of his creditors.[7]

Accordingly it has been held that when an insolvent debtor assigns all his property in trust to pay certain specified creditors, and then without making provisions for other creditors, in trust to reconvey the residue to the debtor, this assignment is fraudulent and void as to creditors not provi-

[1] 2 R. S. 136, § 5.

[2] Wood v. Lowrey, 17 Wend. 495, per Bronson, J. Smith v. Acker, 23 id. 658, per Edwards, senator. But see Benedict v. Smith, 10 Paige, 128, remarks of Walworth, chancellor, which seem to be contra.

[3] Griswold v. Sheldon, 4 Comst. 598.

[4] S. C. in supreme court on the second trial.

[5] Griswold v. Sheldon, 4 Comst. 580.

[6] Wintringham v. Lafoy, 7 Cowen, 735. Boardman v. Halliday, 10 Paige, 229, per Walworth, Ch. Grover v. Wakeman, 11 Wend. 187.

[7] Id.

ded for in the deed.[1] This provision, in favor of the assignor, is not only forbidden by the express terms of the statute,[2] but is contrary to the principles of the common law. A trust in favor of the assignor of goods and chattels was one of the badges of fraud in Twyne's case.[3]

On the principle that an assignment or sale with the intent *to hinder, delay or defraud creditors*, is expressly forbidden by the statute,[4] as well as by the common law, any provision contained in such assignment which tends to that result, will invalidate the instrument. An assignment, in which, by the terms of the deed, the trustees were authorized to sell the property on credit, was declared by the court of appeals to be void against creditors.[5] The chancellor held otherwise in one case,[6] and the doctrine has been controverted in the New-York superior court.[7] But the supreme court has repeatedly decided that an authority in an assignment to sell upon credit, renders the assignment void as against creditors, and that doctrine has subsequently been reaffirmed by the court of appeals.[8]

On the same principle, an assignment that makes it a condition that the creditor shall, on receiving a dividend, execute a release to the debtor of all claims against him, whether his debt be paid in full or not, is void; and being void in part, is void in toto.[9] So an assignment containing a provision authorizing the assignee in his discretion, to change the order of the preferences given therein to the preferred creditors, is void.[10]

An assignment in trust to pay debts which covers real and personal property, cannot be upheld unless the trusts be such as are authorized by the revised statutes. It must provide for debts in existence at the time it is made, and not for debts thereafter to be created. And if preferences among the creditors are contemplated to be made, they must be declared by the assignor in the assignment itself. The power of granting preferences cannot be delegated by the assignor to the trustees; nor can an authority to *incumber* property by a mortgage or other security, be conferred upon the trustees. The only trust authorized by the revised

[1] Barney v. Griffin, 2 Comst. 365.

[2] 2 R. S. 135, § 1.

[3] 3 Coke, 80.

[4] 2 R. S. 137, § 1.

[5] Barney v. Griffin, 2 Comst. 365. Nicholson v. Leavitt, 2 Selden, 510.

[6] Rogers v. DeForest, 7 Paige, 272.

[7] Nicholson v. Leavitt, 4 Sand. S. C. R. 293 et seq., reversed by court of appeals, 2 Seld. 510; but see Meacham v. Sternes, 9 Paige, 398, contra.

[8] Kellogg v. Slawson, 15 Barb. 60. Porter v. Clark, 5 How. Pr. R. 445, decided by the supreme court, 3d district, and affirmed unanimously by the court of appeals, Dec. T. 1853.

[9] Grover v. Wakeman, 4 Paige, 23 affirmed on appeal, 11 Wend. 187. Goodrich v. Downs, 6 Hill, 441.

[10] Strong v. Skinner, 4 Barb. 559.

statutes in this respect, is a trust to *sell* lands for the benefit of creditors;[1] and if a trust in such assignment be created, for any purpose not enumerated in the statute, no estate vests in the trustee.[2] These principles were enforced by the chancellor in an important case, and have been repeatedly acted upon in setting aside assignments in courts of equity, in behalf of the execution creditors of the assignor.

An assignment to be valid must be for a lawful purpose and must be made in good faith. It must be for the payment of such debts or claims as can be enforced either at law or in equity, and be made by a party insolvent, or believing himself to be insolvent at the time. The remarks of Chancellor Walworth on this subject, in a recent case, present in a succinct form, some of the leading principles in this class of cases. In that case, he held that an assignment for the benefit of creditors was void as against creditors, because it attempted to appropriate a part of the assignor's property for the use of his wife, to satisfy an alleged claim in her favor, which she could not have recovered from the assignor by any suit or proceeding either at law or in equity. For that reason, he observes, if the property of the assignor, at the time of the assignment, was not sufficient to pay all his other debts, and this alleged claim also, or so much of it as was attempted to be secured by the assignment, then such assignment was a fraud upon the creditors; inasmuch as it would deprive them of the power of ever obtaining payment of the whole of their debts. On the contrary, if the defendant had ample property to pay all his debts, including the debt due to the complainant, then it was a fraud upon his creditors to assign all his property to an assignee, and to authorize such assignee to employ the proceeds thereof in defending suits which might be brought against the assignor, by his creditors to recover their several debts. For it is equally fraudulent, under the statute, to make an assignment of property for the purpose of *delaying* creditors in the collection of their debts, as it is to assign it for the purpose of *defeating* the final collection of such debts. And this provision of the assignment could have been inserted for no other reason than to enable the assignee to leave the property in the possession or under the control of the assignor; and thus to defend suits which might be brought against the latter to obtain possession of the assigned property, and retain the expenses of such defenses out of the proceeds of such property.

[1] 1 R. S. 728, § 55.

[2] Id. § 58. Barnum v. Hempstead, 7 Paige, 568. Sheldon v. Dodge, 4 Denio, 217. Boardman v. Halliday, 10 Paige, 223. Grover v. Wakeman, 11 Wend. 403; affirming S. C., 4 Paige, 23. Strong v. Skinner, 4 Barb. 559.

The creditors are entitled to payment in cash when their debts become due. And when a man has ample means to pay all his debts in cash, as they become due, there seems to be no reason for making a general assignment, and giving preferences, except for the purpose of delaying the creditors in the assertion of their legal rights.

The power in an assignment to lease or mortgage the estate assigned has been held also void; and the reservation of the right of the assignee to name the successor of the trustee, in case the trustee named in the assignment wished to resign the trust, has also been said, to be objectionable. For it might deprive the court of the power to remove the trustee and appoint another in his place, upon the application of his creditors. For if a creditor should make an application for that purpose, the present trustee, with the assent of the assignor, might immediately substitute another in his place, of the assignor's own selection; and so on from time to time as often as the trustee should be liable to removal by neglect of duty to the creditors.[1]

A sale of goods and chattels may be fraudulent and void as against creditors, although accompanied with an actual delivery and followed by a continued change of possession. It depends on the *intent* of the parties, and this may be inferred from the surrounding circumstances. If the sale be by a party insolvent at the time, to a relative who is an infant, and no security be taken for the payment of the consideration of the purchase, except the infant's promissory notes, and if the vendor immediately absconds on making the sale, the transaction is so obviously fraudulent, that it is the duty of the court to grant a new trial, when a jury find in favor of the validity of the sale.[2] The foregoing case turned upon the question of actual moral fraud, and in some of the other cases which have been stated intentional fraud appears to be mingled with constructive fraud.

It has already been remarked that the revised statutes place the creditors and subsequent bona fide purchasers of the fraudulent vendor, in the same category, a fraudulent sale being alike void as to both.[3] A purchaser without notice, and a creditor, being equally meritorious and equally innocent, the first in title is to be preferred, upon the well known maxim of courts of equity; *Qui prior est in tempore, portior est in jure.* But a subsequent purchaser, bona fide and for a valuable consideration, without notice of a previous voluntary or fraudulent grant, will

[1] Planck v. Schermerhorn, 3 Barb. Ch. R. 645, 646.

[2] Vance v. Philips, 6 Hill, 433.

[3] 2 R. S. 136, § 5.

be protected both at law and in equity.[1] But though he will thus be protected, when prosecuted by a party having no greater equity, yet he will not be assisted against the party upon whom the fraud was committed.[2] Public policy requires that a purchaser, who advances his money upon the faith of a good title to the specific thing, and without notice of any adverse claim, should not be postponed to a prior creditor at large, having no actual lien.

A party who takes a conveyance, with notice of the trust, becomes himself a trustee, unless indeed he purchases from one who had not notice of such claim. In the latter case he may protect himself by want of notice in his vendor.[3] A purchaser without notice from one who has fraudulently purchased, is not affected by the fraud;[4] and it is also a well settled rule of equity, that a man who is a purchaser, with notice himself from a person who bought without notice, may protect himself under the first purchaser.[5] The reason is to prevent a stagnation of property, and because the first purchaser being entitled to hold and enjoy, must be equally entitled to sell.

But a party who purchases with notice of the legal or equitable title of another, cannot protect himself against such claim. His purchase with notice is a constructive fraud upon the rights of the other party, and may, in some cases, be an actual moral fraud. It cannot be made available to defeat the just rights of others, but his title will be made subservient to that of the party thus sought to be defrauded. If he purchase from a trustee with notice of the trust, the purchaser will himself be treated as a trustee, if it be necessary, in order to protect the rights of others.[6]

With regard to what shall be a sufficient notice, it has been held that a purchaser who has sufficient information to put him on inquiry is chargeable in equity with full notice.[7] Notice of an equity to an attorney employed to investigate a title, is notice to his client.[8] Notice to an agent is notice to the principal.[9] But in these cases, in order to affect

[1] Malden v. Merrill, 2 Atk. 8. 2 Fonb. Eq. B. 2, ch. 6, § 2. Beekman v. Frost, 18 J. R. 544, 562.

[2] Id.

[3] 2 Fonb. Eq. B. 2, ch. 6, § 2. Jackson v. Henry, 10 J. R. 185.

[4] Demarest v. Wynkoop, 3 J. Ch. R. 147. Alexander v. Pendleton, 8 Cranch, 462

[5] Gilchrist v. Stevenson, 9 Barb. 9.

[6] Griffith v. Griffith, 9 id. 315.

[7] Green v. Slayter, 4 J. Ch. R. 46. 2 Fonb. Eq. B. 2 ch. 6, §§ 3, 4, and notes. Pendleton v. Fray, 2 Paige, 202.

[8] The M. Bank v. Seton, 1 Peters, 309. The M. Bank v. Louisa, 1 Peters, 309. 2 Mad. Ch. 125. Murray v. Ballou, 1 J. Ch. R. 566. Murray v. Finster, 2 id. 158. Shepherd v. McEvers, 4 id. 136.

[9] Eq. Jur. 32

the principal or client, the notice to the agent or attorney must, in general, arise in the same transaction to which the agency applies.[1] To make the notice available, it must be shown that the agent had authority to receive it, and the natural inference is, that he had such authority if it be given, or arise in the same negotiation or business. Where, therefore, to an action brought for improperly loading a cargo of timber, whereby it was lost, the answer was, that it had been so loaded with the assent of the plaintiff, but the only evidence of such assent was, that the plaintiff's agent knew the manner in which it had been loaded, without having made any objection thereto; it was held that the knowledge and assent of the plaintiff could not be inferred from that fact, as it was not shown that the agent had authority to interfere with the loading of the timber in question.[2]

The reason why notice to the agent must in general be in the same transaction in order to affect his principal, is, not only that otherwise the agent may have had no authority to receive it, but also that he may not be presumed to remember what was casually communicated to him, when he had no interest to remember it.[3] When the reason ceases, the rule itself ceases. An agent must be presumed to remember his written or printed instructions, and those who deal with him are chargeable with the like notice,[4] for they can peruse the instructions and judge for themselves. And when one transaction is closely followed by and connected with another, or when it is clear that a previous transaction was present to the mind of the agent, when engaged in another transaction, there is no ground for the distinction, by which the rule that notice to the agent is notice to the principal, has been restricted to the same transaction.[5]

There is no difference between personal and constructive notice, except as to guilt; for if there were it would produce great inconvenience, and notice would be avoided in every case by employing an agent. This principle is adopted equally at law and in equity.[6]

With regard to real property, if the vendee be in possession under a

[1] Dunlap's Paley on Agency, 263, and cases there cited. Bank U. S. v. Davis, 2 Hill, 461, 463. Hiern v. Mill, 13 Ves. 120. Mech. Bank of Alexandria v. Seton, 1 Peters, 309. Warwick v. Warwick, 3 Atk. 294.

[2] Gould v. Oliver, 2 Scott N. R. 241, 263. Dunlap's Paley on Agency, 236, notes.

[3] Warwick v. Warwick, 3 Atk. 294. Hargraves v. Rothwell, 1 Keene, 154. Perkins v. Bradley, 1 Hare, 230. Mountford v. Scott, 1 T. & R. 274.

[4] Sandford v. Handy, 23 Wend. 267. North River Bank v. Aymar, 3 Hill, 263, 266.

[5] Hargraves v. Rothwell, 1 Keene, 154. and cases cited under note 3.

[6] 2 Scott, N. R. 262. McEwen v. The Mont. Ins. Co. 5 Hill, 101.

contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject thereto.[1] On this principle, a defendant cannot set up that he is a *bona fide* purchaser, if the complainant was in possession at the time of the purchase, claiming the fee.[2] And in like manner, if any person other than the vendor, was in possession of the land, the purchaser has constructive notice of his rights, and takes it subject to them.[3]

The possession of the vendee's tenant is notice to a subsequent mortgagee.[4] A party dealing with real estate, of which another is in the actual possession, is bound to make inquiries of the occupants, and to ascertain the nature and extent of their interests. The legal presumption is that he will make these inquiries, and he is estopped to deny that he made them. If, for instance, a tenant is occupying under a lease for forty-five years, the purchaser is bound by the fact, that he is entitled to that term, if he does not choose to inquire into the nature of the possession, the tenant being in no fault, but enjoying according to his title.[5]

There is, however, a limitation to the extent of the constructive notice in cases of this kind, notwithstanding it is difficult, and perhaps impossible to define it. Though it is true, that when a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; yet if at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenant contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenant.[6]

With regard to what shall be sufficient to put a party on inquiry, no definite rule can be laid down. It must be something more than vague rumor. And perhaps each case must depend upon its own circumstances. Every person is presumed to be cognizant of what is passing in courts of justice; and hence the established rule is that a *lis pendens* duly prosecuted and not collusive, is notice to a purchaser, so as to affect and bind his interest by the decree. This rule was stated, explained and vindicated by Chancellor Kent, on several occasions, and it is firmly estab-

[1] Gouverneur v. Lynch, 2 Paige, 300. Grimstone v. Carter, 3 id. 421. Chesterman v. Gardner, 5 J. Ch. R. 29.

[2] Spofford v. Manning, 6 Paige, 383.

[3] Brice v. Brice, 5 Barb. 533.

[4] The Bank of Orleans v. Flagg, 3 Barb. Ch. R. 421.

[5] Daniels v. Davison, 16 Ves. 254. 2 Fonb. Eq. B. 2, ch. 6, § 3.

[6] Hanbury v. Litchfield, 2 Myl. & K. 629, 632, 633.

lished in our jurisprudence.[1] That it sometimes operated with hardship upon a purchaser without actual notice, was admitted. And the fact that it did so led to the provision in the statute modifying the rule in relation to real estate. It was enacted in 1823, and re-enacted with a slight amendment, in 1830,[2] that to render the filing a bill in chancery, constructive notice to a purchaser of any real estate, it shall be the duty of the complainant to file with the clerk of the county in which the lands to be affected by such constructive notice are situated, a notice of the pendency of such suit in chancery, setting forth the title of the cause and the general object thereof, together with a description of the land to be affected thereby. Each county clerk is required by the act, to place in an index to be kept in his office, such references to the said notices as will enable all persons interested, to search his office for such notices, without inconvenience. The code of procedure requires this notice to be filed at the time of filing the complaint, or at any time afterwards; and if the object of the action be to foreclose a mortgage, it requires it to be filed twenty days before judgment, and in the latter case, it must contain the date of the mortgage, the parties thereto, and the time and place of recording the same.[3] In other respects the doctrine with respect to the effect of a *lis pendens* remains as before.[4]

The revised statutes provide for the recording of all conveyances of real estate, within this state, in the office of the clerk of the county where such real estate is situated, and enact that every conveyance not so recorded, shall be void as against any *subsequent purchaser in good faith* and *for a valuable consideration*, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.[5] This is a revision of the acts relative to deeds[6] and mortgages,[7] of 1813 and of several other acts on the same subject.[8] The decisions of the courts under the registry act, are applicable to similar questions arising under the recording acts now in being.[9] The effect of the statute is to let in the whole of the English equity doctrine of notice.

As one object of the act is to apprise purchasers and subsequent mort-

[1] Murray v. Ballou, 1 J. Ch. R. 576. Heatly v. Finster, 2 id. 158. Green v. Slayter, 4 id. 43. Preston v. Tubbin, 1 Vern. 286.

[2] Laws of 1823, p. 213, § 11. 2 R. S. 174, § 43.

[3] Code of Procedure, § 132.

[4] See as to lis pendens, 2 Fonb. Eq. b. 2, ch. 6, § 3 and notes.

[5] 1 R. S. 756, § 1.

[6] 1 R. L. 369.

[7] Id. 372.

[8] Laws of 1819, p. 269; of 1821, p. 127; of 1822, p. 261, 284; of 1823, p. 412.

[9] See a review of the several N. Y. recording acts, by Paige, P. J., in Fort v. Burch, 6 Barb. 65 et seq.

gagees of the existence of the incumbrance, if the first mortgage be not recorded, and the subsequent mortgagee or purchaser have notice thereof the effect is the same as to him, as if the first mortgage were recorded. But the notice which is thus to supersede the necessity of a recording of the first mortgage, must be direct and positive or implied. A notice which is barely sufficient to put a party on inquiry is not sufficient. Nor is is a suspicion of a notice sufficient.[1] Whatever would in equity charge the party with notice of the equitable rights of a prior purchaser, or incumbrancer so as to deprive him of the privilege of pleading that he is a *bona fide* purchaser without notice, must, in a court of law, be sufficient to protect the legal rights acquired under the unrecorded deed, against the subsequent recorded conveyance.[2] It is the settled doctrine of the courts, that when the equities of the parties are equal, and neither has the legal title, the one who has the prior equity must prevail. Nor will a court of equity permit the party having the subsequent equity to protect himself, by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity.[3] To protect a party, therefore, and to enable him to defend himself as a *bona fide* purchaser, for a valuable consideration, he must aver in his plea, or state in his answer, not only that there was an equal equity in himself, by reason of his having actually paid the purchase money, but that he had also clothed his equity with the legal title before he had notice of the prior equity. And if the person claiming the prior equity is in the actual possession of the estate, and the purchaser has notice of that fact, it is sufficient to put him on inquiry as to the actual rights of such possessor, and is good constructive notice of such rights.[4]

The notice of the prior unregistered conveyance, in order to be available, must be to the party to whom the second conveyance is executed, or to his legal agent. Where land was purchased with the property of the wife, and the conveyance taken to the husband and wife jointly, notice to the husband of the prior unrecorded mortgage will not prejudice the wife. She, on surviving her husband, becomes seised of the entire estate, not under or through her husband, but by the original conveyance, and is unaffected by any notice given to her husband, and not communicated to her.[5]

[1] Fort v. Burch, 6 Barb. 78, per Paige, P. J. Tuttle v. Jackson, 6 Wend. 226, per Walworth, Ch.

[2] 2 id. p. 227. Jackson v. Burgott, 10 J. R. 457. Jackson v. Sharp, 9 id. 163. Jackson v. Humphrey, 8 id. 137. Dey v Dunham, 2 J. Ch R. 182. S. C. 15 J. R. 555. Jackson v. Elston, 12 id. 452. Jackson v. Leek, 19 Wend. 339.

[3] Touville v. Nash, 3 P. Wms. 307. Wigge v. Wigge, 1 Atk. 384.

[4] Grimstone v. Carter, 3 Paige, 436, 437

[5] Snyder v. Sponable, 1 Hill, 567.

The doctrine of constructive notice arising from the recording of a conveyance, is not to be understood of all deeds and conveyances which may be *de facto* registered or recorded, but only of such as are authorized and required by law to be registered or recorded. Upon this principle it was held, that the recording of an assignment of a mortgage was not notice to a mortgagor, so as to render payments by him to the mortgagee, in his own wrong;[1] and this principle is now adopted and declared by the statute.[2]

It is the duty of the incumbrancer to see that his mortgage is correctly recorded; and a subsequent mortgagee or purchaser, in good faith, is not to be charged with notice of the contents of the mortgage, any further than they may be contained in the mortgage as recorded or registered. Where a mortgage for three thousand dollars was, by mistake, registered as being only to secure the payment of three hundred dollars, it was held to be notice to subsequent *bona fide* purchasers, to the extent only of the latter sum.[3]

As the statute requires that deeds and mortgages should be recorded in separate books, it follows that a mortgage recorded only in the book of deeds will not be constructive notice, because a purchaser or subsequent mortgagee is not bound to search among deeds for mortgages.[4] An absolute deed with a subsequent defeasance is a mortgage, and must be recorded as such; and is not constructive notice of a mortgage, if recorded only in the book of deeds. It seems both the deed and defeasance should be recorded in the book of mortgages, to be available against subsequent purchasers or mortgagees without notice.[5]

If the deed or mortgage be improperly recorded, as when the acknowledgment or proof of the execution of the instrument is insufficient, it is not available as notice.[6] And it is equally unavailable if there be any other material defect in the record, having a manifest tendency to mislead the inquirer. In one case, when the record of a mortgage did not state the name of the mortgagee, nor the time when the money was payable, and the acknowledgment did not state that the mortgagor was *known* to the officer taking the acknowledgment, it was held by the supreme court in the fourth district, not to be constructive notice to subsequent purchasers.[7] And although this case was reversed on appeal, by the court

[1] James v. Mowry, 2 Cowen, 246.

[2] 1 R. S. 763, §41.

[3] Frost v. Beekman, 1 J. Ch. R. 288. S. C. 18 J. R. 544.

[4] Dey v. Dunham, 2 J. Ch. R. 182. S. C. 15 J. R. 555. James v. Johnson, 6 J. Ch. R. 432. S. C. on appeal, 2 Cowen, 247. White v. Moore, 1 Paige, 551.

[5] Id.

[6] Frost v. Beekman, 1 J. Ch. R. 300. Hodgson v. Butts, 3 Cranch, 140.

[7] Peck v. Mallam. MS.

of appeals, it was on a ground not affecting the question as to the sufficiency of the registry.

A mortgage not recorded has preference over a subsequent docketed judgment. The statute gives priority in case of several mortgages, to the one first recorded, and it provides that every conveyance of real estate shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded.[1] Were there no statute requiring conveyances to be recorded, a mortgage would stand upon the footing of any other lien on real property. There is nothing in the statute which gives a preference to a judgment docketed over an unregistered mortgage. The judgment being by act of law, does not destroy the lien acquired by an unregistered mortgage, nor gain a preference over it Should the mortgagee permit a sale to take place, prior to the recording of his mortgage, and the vendee of the sheriff have his deed first recorded, he will then gain a preference by means of the record over the mortgage, and the latter will then lose its priority.[2] When a mortgage is given for the purchase money and is executed at the same time as the deed, such mortgage is preferred to any previous judgment which may have been obtained against such purchaser.[3] In all other cases it is believed a judgment first docketed, will have priority over a mortgage subsequently made, whether recorded or not.

The effect of our recording laws has been, among other things, to abrogate the English doctrine of tacking a junior to a senior mortgage, and thus squeeze out the intervening security of another party.[4] The assumed equity of the principle is, that the last mortgagee, when he lent his money, had no notice of the second incumbrance, and the equities between the second and third incumbrancers being equal, the latter, in addition thereto, has the prior legal estate or title and shall be preferred. In the language of the books, "he hath both law and equity." The legal title and equal equity prevail over the equity.[5]

The rule with respect to the effect of notice, resulting from the registry of an incumbrance, is different in England from that which prevails with us. In both countries, the registry operates as constructive notice to subsequent mortgagees. But in England it is not deemed equivalent

[1] 1 R. S. 756, § 1.

[2] Jackson v. Dubois, 4 J. R. 221, 222. Schmidt v. Hoyt, 1 Edw. V. Ch. R. 652.

[3] 1 R. S. 749, § 5.

[4] Grant v. Bank of U. S. 1 Caines' Cas. in error, 112. Parkist v. Alexander, 1 J. Ch. R. 399.

[5] Brace v. Duchess of Marlborough, 2 P. Wms. 491.

to actual notice for any other purpose. And hence in that country, the registry of incumbrances does not interfere with the doctrine of tacking, or affect subsequent purchasers.[1] Nor with us is the record or registry notice to subsequent incumbrancers or purchasers, unless the instrument be legally registered or recorded; nor then is it notice of collateral matters; or of any thing, if it be a mortgage, except the fact that it is a mortgage, the names of the parties, the amount specified in the record, and the time when payable; and in case it be a deed, of the fact that such deed has been executed by the parties thereto of the premises therein described.[2]

To constitute a *bona fide* purchase for a valuable consideration, such purchase, says Chancellor Kent, must be without notice and *with the money actually paid*, or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice at or before the time of the execution of the deed, but that the purchase money was paid before notice. There must not only be a denial of notice before the purchase, but a denial of notice before payment of the money.[3] Even if the purchase money be secured to be paid, yet if it be not in fact paid, before notice, the plea of a purchase for a valuable consideration will be overruled.[4] As a general rule, says Chancellor Walworth, a purchaser of the legal title, who receives his conveyance merely in consideration of a prior indebtedness, is not entitled to protection; because he has lost nothing by the purchase. But the relinquishment of a valid security, which he before held for his debt, and which cannot be revived so as to place him in the same situation, substantially, as to security, as he was in, prior to his purchase, may of itself be sufficient to entitle him to protection as a *bona fide* purchaser.[5]

The rule seems to be the same in this state, with respect to the indorsee of negotiable commercial paper. It is not enough to shut out the equities of the prior parties to the note, that the holder received it in good faith, and before maturity, unless he paid value, or parted with a consideration upon the faith of the paper. If he merely received it on account of a previous indebtedness, although upon a valid consideration between the parties, he is in no worse condition with respect to such indebtedness, than he was before, if he fails to recover the note. His equity is not superior to that of the prior owner of the note, if it was

[1] Latouch v. Dunsany, 1 Sch. & Lefr 157. Ex parte Knott, 11 Ves. 619.

[2] Dey v. Dunham, 2 J. Ch. R. 190, 191.

[3] Jewett v. Palmer, 7 J. Ch. R. 68. Harrison v. Southcote, 1 Atk. 528. Story v. Lord Windsor, 2 Atk. 630.

[4] Id. Hardingham v. Nichols, 3 Atk. 304.

[5] Padgett v. Lawrence, 10 Paige, 180

fraudulently put in circulation. The principle in this class of cases is, that the person passing the note, from the fact of having possession, is the ostensible owner of it, and the holder having, in the usual course of business, given credit to these appearances, which he was justified in doing, has been induced to part with his money or property, *bona fide;* and that, as between him and the real owner, there must be a loss on one side or the other, the law will not divest the holder of fruits he has honestly acquired, without the possibility of remuneration. In other words, the equities of the parties being equal, the law leaves him in possession who already has it. But if the holder, at the time he received the paper, parts with no new consideration on the faith of the same, he may be a gainer if the note prove available; and if not, he remains as he was before. He stands in a different condition from one who makes advances on the credit of the paper; for if that fails, his loss is certain. This is the doctrine of the cases in New-York, and has been upheld by the courts for more than half a century.[1] This doctrine, as explained in Coddington v. Bay, was disapproved by the supreme court of the United States, in Swift v. Tyson,[2] but it was ably vindicated by the chancellor subsequently, in Stalker v. M'Donald,[3] and received the unanimous concurrence of the court of errors. It is still followed by the courts of this state.

Another class of constructive fraud may be seen where one or more subscribers to a common fund, for a charitable object, becomes a party to the subscription paper, under a secret agreement to be released or reimbursed his subscription by the party for whose benefit the fund is raised. The essense of every agreement of this kind is, that there should be a perfect equality among the subscribers as to the nature and extent of their respective liabilities for the several sums subscribed by them respectively Any understanding or agreement, therefore, which gives to one subscriber an advantage over his associates, not known to or approved by them,

[1] Rosa v. Brotherson, 10 Wend. 86, as explained in Smith v. Van Loan, 16 id. 659. Jones v. Swan, 6 id. 589. Hart v. Palmer, 12 id. 523. Ontario Bank v. Worthington, 12 id. 593. Payne v. Cutler, 13 id. 605. Bank of St. Albans v. Gilliland, 23 id. 311. Small v. Smith, 1 Denio, 583. Coddington v. Bay, 20 J. R. 637 affirming S. C. 5 J. Ch. R. 54. Manhattan Co. v. Reynolds, 2 Hill, 140. Stalker v. M'Donald, 6 id. 93. Furniss v. Gilchrist, 1 Sandf. 53. Wardell v. Howell, 9 Wend. 170. Stewart v. Small, 2 Barb. S. C. R. 559. Spear v. Myers, 6 id. 445. Francia v. Joseph, 3 Ed. V. Ch. R. 182. Bank of Salina v. Babcock, 21 Wend. 499. Bank of Sandusky v. Scoville, 24 id 115.

[2] Swift v. Tyson, 16 Peters, 1.

[3] 6 Hill, 93. 2 Kent's Com. 81 to 83

is a fraud upon their rights. Thus, where a subscription was set on foot to raise a fund of fifty thousand dollars for the trustees of Hamilton College, and the subscription paper contained a clause, stating that the subscribers should not be holden to pay the sums subscribed by them, unless the aggregate of all the subscriptions should, by a certain day, amount to the sum of fifty thousand dollars, it was held that an agreement by certain individuals of undoubted responsibility to pay the trustees the amount of the deficiency in the subscription which should exist on that day, the trustees by a resolution pledging themselves to continue to raise funds beyond the day mentioned to make good said deficiency, was not a compliance with the terms of the subscription. Such agreement was a fraud upon the prior subscribers. The subscribers who became such, under a contract to be reimbursed, did not stand on terms of equality and mutuality with the other subscribers. To make the general subscription valid, so as to fill up the whole sum of fifty thousand dollars, within the terms of the agreement, it should have been an absolute donation of the amount of the deficiency, to be paid at the same time as the other subscriptions, and no part of it to be restored or refunded to them upon any contingency or in any event, other than such as was common to the subscriptions of all the other subscribers. The chancellor likened it to an ordinary composition deed, where there is an express agreement between the creditors themselves to discharge the debtor, upon receiving a ratable proportion of their respective debts, in which case it is settled, that any private agreement or understanding between the debtor and any particular creditor that the latter shall, at any time, or in any contingency, receive a greater sum than the amount of his debt, as specified in the composition deed, is held void, as a fraud upon the other creditors.[1]

On the same principle, it is obvious, that all the subscriptions which are taken into the estimate to make up the sum to be raised, must be binding and operative subscriptions, and such as could be enforced in a court of justice. Hence a subscription by a minor, or other person, not competent to contract, should be laid out of the estimate, unless the same were paid in cash.[2] It is a fraud upon the other subscribers to take a subscription, with a view to make up the requisite amount, which is not binding on the party by whom it was made.

Similar questions have sometimes arisen under acts of incorporation granted to railroad companies, turnpike companies, and the like. Thus,

[1] Stewart v. The Trustees of Hamilton College, 2 Denio, 418, 419.

[2] Id.

when a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a real subscriber, by which he has sustained, or by which he might sustain injury, no action can be maintained against him by the corporation, for the amount of his subscription; but when such subscriber has accepted the charter, and by his own acts put it in operation, he cannot avail himself, as a defense of the fact, that part of this stock was fictitious.[1]

[1] C. & K. Turnpike Co. v. McConably, 16 S. & R. 142. Angel & Ames on Corporations, 481.

CHAPTER IV.

OF SPECIFIC PERFORMANCE, CORRECTION, RE-EXECUTION OF AGREEMENTS, AND COMPENSATION.

HAVING treated the general subject of fraud in various aspects, we propose, in this and the two succeeding chapters, to treat briefly of some of the modes by which fraud is anticipated and prevented. Some of these remedies point to some active duty to be performed by the defendant, and others, to his desisting from doing what is contrary to equity and good conscience; or they require third persons to adjust, between themselves, controversies with which the plaintiff has no interest, but in which he is in danger of being involved. We shall treat, in this chapter, of some of the cases in which some active duty is required of the defendant.

Every agreement made between parties capable of contracting, upon a lawful subject matter, and upon an adequate consideration, and which is not contrary to public policy, or against any positive statute, should, if practicable, be performed. This is required no less by sound morals than by law. Every well ordered society must provide some remedy for the violation of agreements. The common law, which left no wrong without some mode of redress, was defective in relation to the violation of contracts, and, in general, afforded no remedy to the injured party but a compensation in damages.

It was felt, at an early day, that this remedy, in numerous cases, was wholly inadequate, and we accordingly find, as early as the reign of Edward the 4th, that courts of equity exercised a jurisdiction in decreeing the specific performance of agreements.[1] It is now well established, by a series of decisions, that this relief will, in general, be granted, whereever a court of law would give damages for the non-performance of the agreement, and such damages would not be an adequate compensation for the non-performance, unless, indeed, circumstances shall have put it out

[1] 1 Madd. Ch. Pr. 287. 1 Fonb. Eq. B. 1, ch. 1, § 5, and notes.

of the power of the party to perform, or the agreement shall be shown to be unfair or unreasonable.

There are some cases where an action at law enables the plaintiff to recover the specific thing in dispute. This is so in the action to recover land, corresponding with the action of ejectment and the old real actions,[1] and in the claim and delivery of personal property, which takes the place of the old actions of replevin and detinue.[2] But these legislative provisions afford a remedy for only a small portion of the cases, where a recovery in specie is desirable.

The consideration of the doctrine of specific performance presupposes that the original transaction is unimpeached and valid, and that nothing remains but to enforce the equity resulting from the non-performance of the agreement. But if the contract sought to be enforced, be lost or destroyed—if through accident or mistake it has been incorrectly framed, or if the transaction be vitiated by fraud—a new equity arises to have the instrument re-executed, the error corrected, or the fraudulent contract rescinded or cancelled. A court of law is, in general, incapable of affording full and perfect relief in these cases, and hence the remedial power of equity must be invoked.

We shall treat of the equities arising in all these cases, in the present chapter.

SECTION I.

OF SPECIFIC PERFORMANCE.

BEFORE treating of the different kinds of agreements, of which equity will decree performance, it may be well to consider some of the circumstances, which are common to all, with respect to this head of equitable relief. It has been remarked by a learned and enlightened English equity judge, that if the contract be entered into by a competent party, and *be in the nature and circumstances of it unobjectionable*, it is as much of course for a court of equity to decree a specific performance, as it is to give damages at law.[3] This doctrine is also well established in this state.[4] The question then recurs, what are the *nature and circumstances of the contract* which may render the execution of it, in specie, objectionable.

[1] 2 R. S. 303.

[2] Code of Procedure, § 206 et seq.

[3] Sir Wm. Grant, in Hall v. Warren, 9 Ves. 608.

[4] Per Savage, Ch. J. in Seymour v. Delancy, 3 Cowen, 505.

The question supposes that the right to a specific performance of an agreement is not coextensive with a right to recover at law. The giving specific performance is, as was said by Lord Eldon, and has often been repeated by others, a matter of discretion; not an arbitrary, capricious discretion; but regulated upon grounds that will make it judicial.[1] And it has been said by eminent judges, that a court of equity will often refuse to enforce a contract, which it would also refuse to annul.[2]

The equity to a specific performance does not arise upon a merely *gratuitous* promise. Chancery will never decree, specifically, a mere voluntary agreement.[3] To entitle the party to the aid of the court, the contract must be supported by a valuable consideration, or, at least, by what a court of equity considers a meritorious consideration, as payment of debts, or making provision for a wife or child.[4]

The question whether inadequacy of consideration alone is sufficient to induce the court to withhold its aid, when called upon to enforce a specific execution of the agreement, has led to much discussion and to some conflict of judicial opinion. It has been shown, in a previous chapter, that inadequacy of consideration is not alone a sufficient ground, in ordinary cases, *to set aside* a conveyance of property.[5] It was said that inadequacy of price might be so great as to afford evidence of fraud; and that even a less degree of inadequacy might, in connection with imbecility of mind, oppression, undue advantage, surprise, or the like, justify the interposition of the court. But in all such cases it is the *fraud*, rather than the *inadequacy* of price, which affords the ground of relief.[6]

But there is, according to some of the cases, a great distinction, in this respect, between ordering a contract to be rescinded, and decreeing it to be performed. Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, (unless its grossness amounts to fraud,) yet it may be sufficient to induce the court to refuse to decree performance. It is not an uncommon thing, says Chancellor Kent, for the court to refuse to enforce, for inadequacy, and, at the same time, refuse to rescind.[7] And, in a subsequent case, the same learned

[1] White v. Damon, 7 Ves. 35. Seymour v. Delancy, 3 Cowen, 445. S. C. 6 J. Ch. R. 222. St. John v. Benedict, 6 id. 111. Goring v. Naish, 3 Atk. 187. Bennett v. Smith, 10 Law and Eq. 272. 16 Jur. 421. Rogers v. Saunders, 4 Maine 92. Frisby v. Ballan, 4 Scam. 287. Mathews v. Terwilleger, 3 Barb. S. C. R. 50.

[2] Jackson v. Ashton, 11 Peters, 229.

[3] Barker v. May, 3 Marsh. 436. Acker v. Phœnix, 4 Paige, 305. Minturn v. Seymour, 4 J. Ch. R. 497.

[4] Id. Thompson v. Attfield, 1 Vern. 40. Longdale v. Longdale, 1 id. 456.

[5] Ante, CHAP. III.

[6] Osgood v. Franklin, 2 J. Ch. C. 24.

[7] Osgood v. Franklin, 2 J. Ch. R. 1 S. C. affirmed in error, 14 J. R. 527.

chancellor said, that inadequacy of price may, of itself, and without fraud or other ingredient, be sufficient to stay the application of the power of the court to enforce a specific performance of a private contract to sell land, though it may be true that mere inadequacy of price, independent of other circumstances, is not sufficient to set aside the transaction.[1] And he dismissed a bill filed for the specific performance of an agreement for the exchange of certain lots for two farms, the inadequacy of price being so great, in his judgment, (being half the value,) as to give to the contract the character of unreasonableness, inequality and hardship.

The decree of the chancellor was reversed on appeal by the court of errors; but as the senator, who gave the prevailing opinion, differed from the chancellor on the matter of fact, as to the degree of inadequacy, it is impossible to know how far the doctrine of Chancellor Kent, as above stated, is modified by the reversal. It becomes necessary to compare the opinion of the chief justice who was for affirming the decree, with that of the learned senator who went for reversing it, and decreeing a specific execution of the agreement. The chief justice, after an elaborate review of the English and American cases, came to the conclusion, on this branch of the case; that if there are circumstances of unfairness, though not amounting to fraud or oppression, or, if the inadequacy of consideration be so great as to render the bargain hard and unconscionable, the court may refuse its aid to enforce the contract, and leave the parties to contest their rights in a court of law.[2]

The learned senator, who delivered the prevailing opinion, admitted that the exercise of the power, in a court of chancery, to enforce the specific performance of contracts for the sale or exchange of land, rests in the sound discretion of the court; that this is a sound legal discretion; and not the exercise of an arbitrary power, interfering with the contracts of individuals, and sporting with their vested rights. He admitted, that the party claiming the specific performance must present a case, *fair*, *just* and *reasonable*; that the contract must be founded on *adequate consideration*; and that it must be free from *fraud*, *misrepresentation*, *deceit* or *surprise*. He admitted, further, that when the inadequacy of price in a contract is so flagrant and palpable as to convince a man, at the first blush, that one of the contracting parties had been imposed on by some false pretense, such a contract ought not to be enforced by a court of equity. It is not to be denied, he observed, that it is the settled doctrine of the court of chancery, that it will not carry into effect, specifically, a contract when the inadequacy of price amounts to conclusive

[1] Seymour v. Delancy, 6 J. Ch. R. 222. [2] Seymour v. Delancy, 3 Cowen, 531.

evidence of fraud. But he could not assent to the doctrine, that inadequacy of price, of itself, and without fraud or other ingredient, was sufficient to stay the application of the power of a court of equity, to enforce a specific performance of a private contract to sell land. And in the case then under consideration, he thought the difference between the price agreed on, and the actual valuation, taking the average of the several witnesses, was but about one-sixth of the contract price, and too small a difference to amount to evidence of fraud.

If the majority of the court agreed with him in the last position, which is one of fact, there was no occasion for their dissenting from the doctrine of the chancellor and chief justice on the important question of law, whether inadequacy alone was sufficient to withhold a decree for a specific performance.

The English cases which have gone the farthest in holding that inadequacy alone is not an answer to a bill for a specific performance, are cases where the sale was at *public auction*. This was the case of White v. Damon,[1] in which Lord Roslyn dismissed the bill, on the ground of inadequacy, and Lord Eldon, upon a rehearing, remarked that the plaintiff was not affected by any thing beyond suspicion; that the sale taking place at an auction, without any fraud, surprise or mistake—the estate being offered upon any price the party would bid—and, without more, the defendant became the purchaser. Such a sale, his lordship said, where there is no fraud, or surprise, cannot be set aside for mere inadequacy of price. It will be very difficult to sustain sales by auction, if a court of equity will not specifically perform the agreement. In a later case, Lord Eldon said, unless the inadequacy of price is such as shocks the conscience, and amounts to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance.[2] That, too, was the case of an auction sale, in which there was in truth no foundation for the charge of inadequacy of consideration. The recent case of Borell v. Dann,[3] was also a case of sale by auction. The vice chancellor said: Fraud in the purchaser is of the essence of the objection to the contract, on the ground of inadequacy. The only exception to the rule for decreeing the specific performance of an unexecuted contract, on the ground of inadequacy of consideration, is, that it is so gross that, of itself, it proves fraud or imposition on the part of the purchaser. The case must, however, be strong indeed, in which a court of justice shall say that a purchaser at a public auction, between whom and the vendors there has been no previous communication, affecting the fairness of the

[1] 7 Ves. 30. [2] Coles v. Trecothick, 9 Ves. 246. [3] 2 Hare, 451

sale, is chargeable with fraud or imposition, only because his bidding did not greatly exceed the amount of the vendor's reserved bidding.

The early English cases, in the time of Lord Hardwicke, in transactions between party and party, and where the sale was not at auction, hold a different language. Thus, in 1740, Lord Hardwicke said in the case of a hard bargain, when it is not absolutely executed, but executory only, the constant rule of the court is, not to carry it into execution.[1] And in another case, he observed that nothing is more established in the court of equity, than that every agreement sought to be specifically enforced ought to be certain, fair and just in all its parts; and if any of those ingredients are wanting in the case, the court will not decree a specific performance.[2] In another case Lord Hardwicke refused to decree specific performance, on the ground that the court was not obliged to do so, when it would be attended with great loss and hardship to one of the parties, and compensation in damages could be made.[3] Lord Eldon observed in one case, that there are many cases in which the court will not disturb an agreement that has been executed; though it would have refused to carry that agreement into execution; and where, refusing to execute the agreement, it will leave the party to make the most of it at law.[4] It is true his lordship was not then considering the question of inadequacy. But if the court may refuse to carry into effect a hard bargain, it may certainly refuse relief when the consideration is so far inadequate as to constitute a hard bargain.

The recent English cases incline to hold inadequacy alone as an insufficient ground to prevent a decree for a specific performance, thus placing cases under this head of equity upon the same footing with bills to rescind agreements for inadequacy of consideration, though the cases on the subject are not entirely consistent.[5]

In this country the weight of authority is, that though equity will not set aside an executed agreement for inadequacy of consideration, not amounting to evidence of fraud, yet it will, in private sales, refuse its aid to carry it into execution, though the inadequacy be not sufficient to set it aside.[6] A bill in equity for the specific performance of a contract is an

[1] Barnardiston v. Lingood, 2 Atk. 134.

[2] Buxton v. Lister, 3 id. 385.

[3] City of London v. Nash, 3 id. 515.

[4] Willan v. Willan, 16 Ves. 83.

[5] Western v. Russell, 3 Ves. & Beame, 193. Griffith v. Spratley, 2 Br. Ch. Cas. 179. Adams v. Weare, 1 id. 567. Mortimer v. Capper, id. 156. Adams' Eq. 79. Phil. ed. 208. But see 1 Mad. Ch. Pr. 336, contra; and Vigers v. Pike, 8 Clarke & Fin. 562, 645.

[6] Clitherell v. Ogilvie, 1 Desaus. 250. Osgood v. Franklin, 2 J. Ch. R. 23. S. C. on appeal, 14 J. R. 527. Seymour v. Delancy, 6 J. Ch. R. 223. S. C. on appeal, 3 Cowen, 445. St. John v. Benedict, 6 J. Ch. R. 111. Gasque v. Small, 2 Strobh. Eq. 72.

application to the sound discretion of the court, which withholds or grants relief, according to the circumstances of each particular case; and, in the exercise of its extraordinary jurisdiction in such cases, the court, though not exempt from the general rules and principles of equity, acts with more freedom than when exercising its ordinary powers. The contract must be fair and just and certain, and founded *on an adequate consideration;* and if deficient in either of these requisites, its performance will not be decreed: hence, the plaintiff who seeks the enforcement must make out a stronger case than he who resists the decree.[1] Greater latitude will be allowed to the defendant in resisting, than will be allowed to the plaintiff in making out his case.[2]

The agreement to be enforced must be mutual in its character and certain in its terms.[3] If the party seeking to enforce the agreement was not himself liable, and the same could not be enforced against him, there is no reciprocity in allowing him to enforce it against the other party. This was one of the grounds on which Chancellor Kent denied relief in Benedict v. Lynch, though there were other objections to the plaintiff's recovery.[4] The same doctrine is explicitly recognized by Chancellor Walworth;[5] and by Edmonds, J.[6] Mutuality and certainty are, in general, indispensable requisites to the granting of relief.[7]

The only exception to the rule, with respect to mutuality, is, when an agreement, under the statute of frauds, has only been executed by the party sought to be charged. In this class of cases, although the plaintiff has not signed the agreement and it cannot be enforced against him, yet he can enforce it against the other party, by whom it has been executed. This seems to be well settled by the English and American cases.[8] It was at one time questioned by Lord Redesdale,[9] who thought that the contract ought to be mutual to be binding, and that if one party could not enforce it the other ought not. Chancellor Kent in Clason v. Bailey

[1] Tyson v. Watts, 1 Maryl. Ch. Decis. 13.

[2] Casey v. Holmes et al., 10 Alabama, 776. Story's Eq. § 769. Cathcart v. Robinson, 5 Peters, 264, 276.

[3] Bromley v. Jeffers, 2 Vern. 415.

[4] 1 J. Ch. R. 307.

[5] German v. Machin, 6 Paige, 288. m

[6] Woodward v. Harris, 2 Barb. S. C. R. 439. Philips v. Berger, id. 611; affirmed on appeal, 8 id. 527.

[7] Rogers v. Saunders, 4 Maine R. 92 Bronson v. Cahill, 4 McLean, 19. Tyson v. Watts, 1 Maryl. Ch. Decis. 13. Beard v. Linthicum, id. 345.

[8] Seton v. Slade, 7 Ves. 275. Fowle v. Freeman, 9 id. 351. Clason v. Bailey, 14 J. R. 484, per Kent. McCrea v. Purmort, 16 Wend. 406, affirming Att'y Gen. v. Purmort, 5 Paige, 620. Woodard v. Aspinwall, 3 Sandf. S. C. R. 272. Sutherland v. Briggs, 1 Hare, 34.

[9] Lawrenson v. Butler, 1 Sch. & Lefroy, 13.

already cited, said that the weight of the argument was in favor of the construction, that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. And Verplanck, senator, in a case in the court of errors in 1841, expressed the same opinion ;[1] but both agreed that the law was well settled the other way, both in this country and Great Britain. The law, as settled, grew out of the phraseology of the statute of frauds, which did not, under the former statute, require the note or memorandum of the agreement to be *signed*, nor, under the revised statutes, to be *subscribed*, save by the party to be charged.[2] The revisers recommended a change in the language of the act, so as to conform it to the opinion of Lord Redesdale and Chancellor Kent; but the legislature rejected that alteration and adhered to the old words.[3] The contract in these cases is morally binding on both sides, and the promises to buy and sell are mutual considerations for each other. The statute then requires written evidence of the bargain. One party gives this, and it is his own neglect that alone prevents him from obtaining the same evidence from the other. But he ought not to take advantage of his own negligence, nor should that free him from the legal effect of his own promise, duly evidenced in writing, according to law.[4]

The cases already cited to show that a contract to be enforced specifically, must be founded upon an adequate consideration, and must be mutual and certain, prove also that it must be *fair* and *just* in all its parts, and not a *hard* or *unconscionable* bargain. If the agreement be a hard and unreasonable one,[5] if it lack mutuality, if it be uncertain, or if it be upon an inadequate consideration, if it be tainted with fraud, or if the performance of it be unlawful, or would subject the party to a penalty, or if its performance has become impossible, equity will not order it to be enforced, but leave the parties to their remedies at law.[6]

In general, specific performance will not be decreed, if the remedy at law upon the agreement be adequate, and will afford complete relief and be not embarrassed by any circumstances rendering the interposition of a court of equity necessary. If compensation in damages will put the ag-

[1] Davis v. Shields, 26 Wend. 362.
[2] 1 R. L. 78, § 11. 2 R. S. 135, § 2.
[3] 3 R. S. 2 ed. 656, revisers' notes.
[4] Per Verplanck, in Davis v. Shields, 26 Wend 363.
[5] Kimberly v. Jennings, 6 Sim. 340
[6] Thompson v. Thompson, 7 Ves. 473. Platt v. Adams, 7 Paige, 615, and see ante.

grieved party in a situation as beneficial to himself, as if the agreement were specifically performed, he will, in general, be left to his remedy at law.[1]

The foregoing remarks are sufficient to show the general grounds on which relief in equity is granted or refused in cases of this nature. They will be again to a certain extent brought under review, when we come to consider, more at large, some of the leading cases on the subject.

When specific performance of a contract would be decreed between the original parties to a contract, it will be decreed between all claiming under them, if there are no intervening equities controling the case.[2] At common law, if the estate of the contracting party devolved upon an infant, by the death of the party to the contract, the remedy to enforce specific performance was delayed until the infant became of age; and if the party became lunatic, the remedy was deferred until the disability was removed.[3] In England, by recent statutes, the court, in these cases, after a decree has been pronounced, may direct a conveyance as in the case of an incapacitated trustee.[4] In New-York it is enacted, that the court of chancery (now the supreme court or county court) shall have power to decree, and compel a specific performance, by any infant heir or other person, of any bargain, contract or agreement, made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, contract or agreement, and on hearing all parties concerned, and being satisfied that the specific performance of such bargain, contract or agreement ought to be decreed or compelled.[5] This provision was first adopted by the act of 1814, to remedy the necessity of a special application to the legislature, which before that time was the only remedy, in case the obtaining of title, before the infant arrived at mature age, was necessary.[6]

This statute, however, has no extra-territorial efficacy; and hence, if the lands of an infant heir, which the ancestor was under an agreement to convey, are situated in another state, and the infant be domiciled in this state, the court may decree as pecific performance of the agreement, and direct a conveyance when the infant arrives at full age; and that in the meantime the vendee be permitted to retain the possession of the property.[7] The chancellor said it was per-

[1] See remarks of Lord Redesdale, in Harnet v. Yielding, 2 Sch. & Lefr. 552, 553. Halsey v. Grant, 13 Ves. 77. Cathcart v. Robinson, 5, Peters, 264. 1 Fonb. Eq. B. 1, ch. 1, § 5 and notes. Flint v. Brandon, 8 Ves. 163.

[2] Hays v. Hall, 4 Porter, 374.

[3] Adams' Eq. 81.

[4] 1 Wm. 4, c. 60, §§ 16, 17. Id. 65, § 27.

[5] 2 R. S. 194, § 169.

[6] Laws of 1814, p. 128, 129, § 3.

[7] Sutphen v. Fowler, 9 Paige, 280.

fectly well settled, that a court of equity has jurisdiction to decree the specific performance of a contract for the sale of lands in another state, when the person of the defendant is within the reach of its process.[1]

A contract to convey lands, which is signed by the husband and wife, but is not duly acknowledged by the wife, is the contract of the husband only; and is neither binding upon the wife, nor upon her heirs after her death. The court, therefore, cannot decree a specific performance of it against the wife in her lifetime, nor against her heirs on her decease.[2]

In case the party to a contract afterwards becomes a lunatic, a court of equity in New-York has authority, by statute, to decree and compel the specific performance of any bargain, contract or agreement, which may have been made by any lunatic or other person of unsound mind, while such lunatic or person of unsound mind was capable to contract; and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose.[3] This was merely the revision of the act of 1801, which conveyed the like authority.[4] But this act does not reach the case where the contract was made by the ancestor, and the duty to perform it descended to his lunatic heir. Other sections of the act apply to such a case. Thus, by the 19th section,[5] it is enacted that whenever any idiot, lunatic or other person of unsound mind, shall be seised or possessed of any real estate by way of mortgage, or *as a trustee for others in any manner*, his committee may apply to the court of chancery (now the supreme court) for authority to convey and assure such real estate to any other person or persons entitled to such conveyance or assurance, in such manner as the said court shall direct; upon which a reference shall be had, and the court, upon the hearing of the parties interested, may order such conveyance or assurance to be made. And by the 20th section it is further enacted, that on the application of any person entitled to such conveyance or assurance, by bill or petition, the committee may be compelled by the court of chancery, (now the supreme court,) on a hearing of all parties interested, to execute such conveyance or assurance.

The foregoing statutory provisions have been held by an eminent equity judge,[6] to confer upon the court sufficient authority to decree the specific

[1] Sutphen v. Fowler, 9 Paige, 280. The Earl of Arglasse v. Muschamp, 1 Vern. 135. Massie v. Watts, 6 Cranch, 148. Penn v. Lord Baltimore, 1 Ves. sen. 144.

[2] Knowles v. McCamly, 10 Paige, 342. Martin v. Dwelly, 6 Wend. 9.

[3] 2 R. S. 55, § 22.

[4] 1 R. L. 148, § 5.

[5] 2 R. S. 55, §§ 19, 20.

[6] Swartwout v. Burr, 1 Barb. S. C. R. 495, 499, per Paige, J.

execution, by a lunatic heir, of a contract for the sale of land, made by the ancestor in his lifetime. The same learned judge said on the same occasion, that when a contract is made for the sale of land, the vendor is in equity immediately deemed a trustee of the vendee of the rea estate, and the vendee a trustee of the vendor, of the purchase money. The trust in the vendor, for the vendee, attaches to the land and binds the heirs of the vendor.[1] This is the unquestioned doctrine of courts of equity, and results from the principle, that what is contracted to be done for a valuable consideration, is considered as done, and nearly all the consequences arise, as if it had been so, and as if a conveyance had been made at the time to the vendee.[2] At law, it is otherwise. There the estate remains the estate of the vendor, until the conveyance is executed, and the money that of the vendee, until it is paid. But it is not so in equity, as has already been shown.[3] Hence it follows, that on the death of the ancestor, who had made a valid agreement to sell, the estate descended to the lunatic heir, charged with the trust which the court was authorized by the statute to cause to be executed.

The agreements which courts of equity will specifically enforce may be divided into three general heads; 1st. Those which relate to personal property; 2d. Those which relate to personal acts; and 3d. Those which relate to real property. It has been shown already, and will appear more fully as we proceed, that the remedy in equity, in the cases comprehended under the foregoing heads, is not coextensive with the wrongs which may happen under them.

(1.) With regard to contracts relative to personal property, courts of equity have been less inclined to interpose than in those relating to real estate. At an early day, it was held that a bill in equity did not lie for a specific performance of an agreement to transfer stock.[4] The principle on which relief was refused is, that there can be no difference between one man's stock and that of another; that the remedy at law is perfect, and that compensation in damages will enable the party to purchase other stock of equal value. But, in modern times, a bill has been held to lie for the specific performance of a contract for the purchase of government stock, where it prayed for the delivery of certificates which gave the legal

[1] Swartwout v. Burr, 1 Barb. S. C. R. 499. Champion v Brown, 6 J. Ch. R. 402 et seq. Craig v. Leslie, 3 Wheat. 577. Peter v. Beverly, 10 Peters, 532.

[2] Frederick v. Frederick, 1 P. Wms. 713. Lechmere v. Earl of Carlisle, 3 id. 215. Bash v. Dalway, 3 Atk. 533.

[3] Seton v. Slade, 7 Ves. 274. 1 Mad. Ch. Pr. 289.

[4] Cud v. Rutter, 1 P. Wms. 570. Nutbrown v. Thornton, 10 Ves. 160.

title to the stock.[1] The plaintiff in that case, not being the original holder of the scrip, but merely the bearer, the vice chancellor thought he might not be able to maintain any action at law upon the contract, and that if he had any title, it must be in equity.

But there are numerous cases in which equity will interpose, and order a particular chattel to be given up. Thus, in an early case, where land was held by the tenure of a horn or *cornage*, on which horn there was a peculiar inscription, the court entertained a bill for the delivery of it to the plaintiff.[2] This, as was said by Lord Eldon in Nutbrown v. Thornton, (10 Ves. 163,) turned upon the *pretium affectionis*, independently of the circumstance as to tenure. In the latter character it savored of the realty, and in the former it was not susceptible of compensation in damages.

There are cases, however, in which the court grants specific performance of agreements of a personal nature. Thus, in an early case,[3] the defendants entered into an agreement in writing with the plaintiff for the purchase of large parcels of wood, consisting of oaks, ashes, elms and asps, which are numbered, figured and cyphered, standing and being within the township of Kirby, for the sum of £3050, to be paid at six several payments, every lady day, for the six following years; and the defendants to have eight years for disposing of the same, and that articles of agreement should be drawn and perfected as soon as conveniently could be, with all the usual covenants, &c. The agreement was signed by all the parties, and the bill was brought by the vendor for the specific performance of it. After a discussion of the matter, Lord Hardwicke observed, that the subject was divided into two questions; first, whether the plaintiff is entitled to seek his remedy in a court of equity for a specific performance; and secondly, whether as to the merits of his case he is entitled to such a decree.

As to the first, his lordship said, I am of opinion, that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance.

To be sure, in general, said he, this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c., for as these are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one

[1] Doloret v. Rothschild, 1 Sim. & Stu. 590.

[2] Pusey v. Pusey 1 Vern. 273. Lloyd v. Loaring, 6 Ves. 773. Livingston v. Lynch, 4 J. Ch. R. 596.

[3] Buxton v. Lester, 3 Atk. 382.

side, when, upon an action, that party might not have paid above a shilling damage. Therefore, the court have always governed themselves in this manner, and left it to law, where the remedy is so much more expeditious. As to the cases of contracts for the purchase of lands or things that relate to realties, these are a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

Notwithstanding this general distinction between personal contracts and contracts for land, his lordship stated, that there were some cases where persons may come into a court of equity, to enforce personal contracts, and he cited as in point the case of Taylor v. Neville, which was a bill for the performance of articles for the sale of eight hundred tons of iron, to be paid for in a certain number of years, and by installments, and a specific performance was decreed.[1]

In the same case Lord Hardwicke pointed out a distinction between contracts of a personal nature, not immediately to be performed and peculiar in their character, and those which are immediately to be executed. In the former case, several circumstances may concur. Thus, a man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.

On the part of the seller, suppose a man wants to clear his land, in order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case, but the performance of the contract in specie.

In the case of John, Duke of Buckinghamshire v. Ward, a bill was brought for a specific performance of a lease relating to alum works and the trade thereof, which would be greatly damaged if the covenant was not performed on the part of Ward. The covenants lay there in damages, and yet the court considered if they did not make such a decree, an action afterwards would not answer the justice of the case, and, therefore, decreed a specific performance.

Suppose, he furthers observes, two partners should enter into an agreement to carry on a trade together, and it should be specified in the memorandum that articles should be drawn pursuant to it, and, before they are drawn, one of the parties flies off, I should be of opinion, upon a bill brought by the other, in this court, for a specific performance, that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed.

[1] Taylor v. Neville, cited in Buxton v. Lester, 3 Atk. 384.

On the circumstances of the case before him, he thought the bill ought to be entertained, but at the same time, he added, that courts ought to weigh with great nicety cases of this kind, before they determine the bill proper, when it is a mere personal chattel.

This case of Buxton v. Lister, already considered much at length, affords an apt illustration of the principles as well of *withholding* as of *granting* relief, when a specific performance of an agreement is invoked The defendants had only offered 2800 pounds for the timber, and the plaintiff insisted upon 3500, and stated that F. and C., two timber merchants, had valued it at so much, and that this was true on his honor, and when he said a thing on his honor, the defendant ought to believe it. The defendants afterwards agreed to give 3050 pounds for the wood, on the opinion they had of the judgment of F. and C. It turned out, however, that F. and C. did not set any greater valuation than 2500 pounds upon the timber, and this misrepresentation was the ground which induced the defendants to enter into the agreement. And because of this misrepresentation, the court refused to compel the defendants to execute the agreement, and dismissed the bill.

The principle on which courts of equity decree the specific performance of contracts does not rest upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, specific performance was decreed, at the suit of the vendor, of a contract for the sale of debts proved under a commission of bankruptcy.[1] The court said that damages at law could not accurately represent the value of the future dividends; and to compel the purchaser to take such damages, would be to compel him to sell these dividends at a conjectural price.

Nor did it alter the case that the vendor was the party seeking not the uncertain dividends, but the certain sum to be paid for them. It is well settled that the remedy in equity must be mutual, and that where the bill will lie for the purchaser, it will also lie for the vendor.[2]

In one case, specific performance was decreed in the house of lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff. Damages in such case would be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages, would

[1] Adderly v. Dixon, 1 Sim. & Stuart, 607. [2] Id

be to compel him to sell the annual provision during his life, for which he had contracted, at a conjectural price.[1]

The principle of the foregoing cases was well illustrated by a recent case, in New-York.[2] In that case the plaintiff was the owner of a judgment against a third party for $9837.66, on which a creditor's bill had been filed. During the pendency of the suit the defendant entered into a contract with the plaintiff, whereby the latter agreed that for $4500 of the costs he would compromise the claim. The defendant afterwards declined to perform the contract, and the plaintiff filed a bill for a specific performance. The court treated the contract as one for the absolute purchase, by the defendant, of the plaintiff's judgment, and entertained no doubt that a bill for a specific performance would lie. And the learned judge stated the principle to be, that where an award of damages would not put the party in a situation as beneficial as if the agreement were specifically performed, or if the compensation in damages would fall short of the redress which his situation might require, it was a proper case to decree the execution of it in specie. The judge remarked that the contract in this case respected a chose in action, viz. the sale or compromise of a judgment. And for the defendant's refusal to complete his purchase, an action at law would lie, and damages could be recovered against him. But what damages? And would that be a complete and satisfactory remedy? The remedy of a specific performance is mutual and reciprocal, as well for the vendor as the purchaser; and the true inquiry is, would an action at law afford to the defendant a complete and satisfactory remedy, if the plaintiff had refused to assign or release the judgment according to his contract? The judge said he could well imagine many uses to which the defendant might have put the judgment, which could not be at all, except by very vague conjectures, measured or estimated. And if, on that account, he would have been entitled to a specific performance, then, for the same reason, the plaintiff would be entitled.

In some of the foregoing cases the covenant savored of the realty, but the decision was not put upon that ground, but upon the imperfection of the remedy at law. Though it be the general rule that courts of equity do not ordinarily enforce the specific execution of contracts relating to personal property, because courts of law usually afford a complete remedy; yet, whenever a violation of the contract cannot be correctly estimated in damages, or, wherever, from the nature of the contract, a specific

[1] Ball v. Coggs, 1 Bro. P. C. 140.

[2] Philips v. Berger, 2 Barb. S. C. R. 608; affirmed on appeal, 8 id. 527. Wood v. Rowcliff, 3 Hare, 304.

performance is indispensable to justice, a court of equity will not be deterred from interfering, because the contract relates to personal property.

The courts in this country have inclined to carry the doctrine of specific performance, with respect to personal property, further than it is in England.[2]

In considering the cases where equity interferes to enforce contracts specifically, relative to *personal property*, some of the illustrations would not be inappropriate under the second head; namely, contracts which relate to *personal* acts. Indeed, no division of the subject can be so accurately drawn that the cases will not run into each other.

(2.) We proceed now to notice the doctrine with respect to decreeing the performance of *personal acts*.

These cases depend upon the same principle, that damages afford an inadequate relief, and that performance in specie will alone answer the purposes of justice. Thus, in a recent case,[3] Chancellor Walworth held that the court had jurisdiction to compel the specific performance, by the defendant, of a covenant to do certain specified work, or to make certain improvements, or erections upon his own land, for the benefit of the complainant, as the owner of the adjoining property, who had an interest in having such work done, or such improvements or erections made; and where the injury to the complainant, from the breach of the covenant, was of such a nature as not to be capable of being adequately compensated in damages. The case was this: The complainant granted to the corporation of the city of New-York certain lands, for the purposes of a public square, upon condition that such lands should forever be used and appropriated, for the purposes of a public square, exclusively, and upon the further condition, that the corporation should immediately proceed to regulate the lands granted, and should inclose and improve the same in the manner specified in the conveyance thereof. The corporation joined in such deed, by executing it under the corporate seal, and covenanted to stand seised of the premises for the purpose of a public square, exclusively, and that such corporation would abide by, observe and perform the conditions imposed upon it by the acceptance of such agreement and conveyance. The chancellor held that the corporation was bound to perform the conditions specified in the conveyance, and was liable to respond to the complainant, in damages, for the non-performance thereof. And it was further held, that the complain

[2] Fells v. Reed, 3 Ves. 70. Sullivan v. Turk, 1 Maryl. Ch. Decis. 59. Waters v. Howard, id. 112.

[2] Barr v. Lapsly, 1 Wheat. 152. Philips v. Berger, 2 Barb. S. C. R. 608.

[3] Stuyvesant v. The Mayor of N. Y., 11 Paige, 414, 427.

ant had a right, at his election, to re-enter for a non-performance of the conditions of the deed; or to bring an action for the damages sustained by the breach of the covenants of the corporation; or to file a bill in equity, to compel a specific performance of these covenants.[1]

On the same principle, where a railroad company, upon an adequate consideration, agreed with the plaintiff, through whose pleasure grounds they laid their railroad, to construct and forever maintain one neat arch way, sufficient to permit a loaded carriage of hay to pass under the arch way, at such place as the plaintiff, his heirs and assigns should think most convenient, in his pleasure grounds, and to form and complete the approaches to such archway, it was held that the court had jurisdiction to enforce the specific performance of the contract.[2]

In this case damages would not be an adequate compensation; and there is no principle on which they could be accurately estimated. The case is, therefore, distinguishable from those where relief at law is adequate and complete.[3]

The personal acts with respect to which courts of equity entertain jurisdiction to decree performance specifically, have reference to property of some kind. There is none where a contract for personal services alone has been *actively* enforced.[4] There are several, however, in which the court has interfered *negatively*. Thus, in the case of a theater considered as a partnership, a contract with the proprietors not to write dramatic pieces for any other theater is valid, and a violation of it will be restrained by injunction.[5] As was intimated by Lord Eldon in that case it is not unreasonable that an actor and a writer for the stage should engage for the talents of each other; and that neither should write or act but for the theater in which they are jointly interested. But when there is no *partnership* between the parties, and the defendant has violated his engagement to one theater and formed a conflicting engagement with another, a court of equity will not interfere either *actively* to compel performance of one contract, or *negatively* to prevent the performance of the other.[6]

Suppose the contract be, to act at a particular theater, or to sing at a particular opera, and it be broken, there is clearly no way in which the

[1] Stuyvesant v. The Mayor of N. Y., 11 Paige, 414, 427.

[2] Storer v. Great Western Railway Co. 2 Y. & Col. 48.

[3] Flint v. Brandon, 8 Ves. 160.

[4] Haight v. Badgley, 15 Barb. 501. Hamblin v. Dunneford, 2 Ed. V. Ch. R. 522. De Rivafinoli v. Corsetti, 4 Paige, 264. Sanquirico v. Benedetti, 1 Barb. S. C. R. 315. Kemble v. Kean, 6 Sim. 333.

[5] Morris v. Colman, 18 Vesey, 437. Clarke v. Price, 2 Wilson, 157.

[6] Kemble v. Kean, 6 Sim. 333.

court can compel performance. Sequestration of his property, or a commitment to jail on his refusal, is a substitute for performance no better than damages at law. The court has no process by which a fulfillment of the contract can be compelled. And in such cases it is proper to leave the parties to a court of law, and let the damages be adjusted by a jury.[1]

There are, however, numerous cases arising between landlord and tenant, and in cases of partnership, where personal covenants will be decreed to be enforced. They generally rest upon the reasons already stated, the inadequacy of the remedy at law, and the difficulty of ascertaining the damages. Thus a covenant to give a lease, or to renew a lease, has been required to be executed, and to contain also a covenant for a further renewal.[2] So an agreement to form a partnership and execute articles accordingly may be specifically enforced.[3] So a covenant to sustain and repair the banks of a river.[4]

In many cases the court interferes negatively, and restrains a covenantor from a breach of his agreement, and thus, in effect, enforces a specific performance. Thus, injunctions to restrain waste; to prevent the cutting down and removal of timber; to prevent the removal of manure, or crops at the end of the lease, and the like; but these cases more properly belong to the head of injunctions.

Where a party agrees, for a certain consideration, to permit a railroad corporation to construct a road over his land, on any one of two or more routes, at their option, and to convey the land to the corporation for certain sums, according to the route that shall be taken, after the road shall be definitely located, he cannot defend against a bill for specific performance of his agreement, by showing that he was induced to believe, either by his own notions or by the representations of third persons, as to the preference of one route over another, that the corporation would select a route different from that which they finally adopted; nor by showing that the corporation or its agents made representations as to the probability that one route would be adopted in preference to another, or as to the relative advantages of each route.[5] Having, by the terms of the contract, stipulated for the right to adopt either route, and to pay a consideration for such right of choice, all representations respecting the probability of their adopting one rather than the other must be considered as merged in the agreement. In a contract of this kind, it is obvious that a specific performance is the only adequate remedy. The use of the

[1] Kemble v. Kean, 6 Sim. 333. De Rivafinoli v. Corsetti, 4 Paige, 264. Kimberly v. Jennings, 6 Sim. 340.

[2] Turnival v. Crew, 3 Atk. 83.

[3] Buxton v. Lister, 3 Atk. 387.

[4] 3 Kent's Com. 467.

[5] Western R. R. Corporation v. Babcock, 6 Metcalf, 346.

land, when the location is fixed, is absolutely essential to their franchise and a compensation in damages, in an action at law, would afford them no relief.[1]

(3.) We proceed now to the third class of cases, where equity decrees a specific performance, viz. contracts relating to real property. This class embraces by far the most numerous instances in which the jurisdiction of a court of equity is invoked, to enforce this peculiar remedy for the violation of contracts. With respect to the interference of the court to enforce contracts specifically, relative to *personal property*, or to perform specifically *personal acts*, we have seen that the jurisdiction is not universal; and that peculiar circumstances must exist to call forth the remedial agency of the court; the reason for which is, that, in general, a compensation in damages is coextensive with the merits of the case. But it is otherwise with respect to contracts relative to real estate. Here the jurisdiction to enforce performance is universal, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to a purchaser, to whom the land may have a peculiar and special value.[2]

The cases in which equity grants specific performance of contracts relative to land, may be considered under two heads; first, contracts by parol within the statute of frauds, and second, contracts in writing not within the statute.

Although it be true as a general maxim that equity follows the law, yet there are numerous cases where relief will be granted by a court of equity in enforcing contracts upon which no action for damages could be maintained at law. This happens when the party seeking relief has failed, without fault or unreasonable delay, to perform literally the terms of the contract, either in point of time, or other immaterial circumstance. The strict performance which the law requires of a plaintiff, of the parts of the contract on his part, operates sometimes oppressively. Thus, for example, performance or an offer to perform at the day, even where time is not of the essence of the contract, is indispensable to the maintenance of an action at law; but affords no conclusive objection to relief in a court of equity.

Again, as the interposition of courts of equity is in some respects discretionary, they will not enforce a specific performance in every case where an action at law to recover damages might be maintained. If there

[1] Western R. R. Corporation v. Babcock, 6 Metcalf, 346.

[2] Adderly v. Dixon, 1 Sim. & Stu. 607

be circumstances which render a specific performance inequitable; as, for instance, if the title of the vendor who seeks relief be involved in difficulties; or if, in any case, the party seeking aid has conducted unfairly; if the consideration be grossly inadequate; if the agreement were obtained by fraud, or misrepresentation; by surprise, mistake or undue advantage; if it be a hard or an unconscionable agreement; if its performance will involve the violation of law or public policy; or if the circumstances under which it was made, have so far changed that it would be unconscientious to enforce it; equity in all these, and the like cases, leaves the parties to their remedy at law.[1]

But, as has been stated in this chapter already, if the contract relative to real property is in its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance, when the contract is in writing, and is certain and fair in all its parts, and is for an adequate consideration, and is capable of being performed, as it is for a court of law to give damages for the breach of it; what those objections are, have in part been considered, and will be again brought to our notice.

We will now consider, in the first place, under what circumstances a specific performance will be decreed of contracts respecting land, which come within the purview of the statute of frauds. The English statute of frauds (29 Charles 2d, ch. 3) was substantially enacted in this state in 1787, (1 R. L. 75,) and it has been pretty generally adopted in this country. Some slight changes were made at the revision in 1830, and, as now in force, the enactments are as follows: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing."[2] § 8: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party, by whom the lease or sale is to be made."

[1] Seymour v. Delancy, 3 Cowen, 445. 6 J. Ch. R. 222. Hall v. Warren, 9 Ves. 608. The Duke of Bedford v. The Trustees of the British Museum, 2 Myl. & K. 552. Taylor v. Longworth, 14 Pet. R. 172. King v. Hamilton, 4 id. 329. Pratt v. Adams, 7 Paige. 615.

[2] 2 R. S. 134, § 6.

"In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith. 1. Every agreement that, by its terms, is not to be performed within one year from the making thereof; 2. Every special promise to answer for the debt, default, or miscarriage of another person. 3. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry."[1] By the act concerning uses and trusts, all resulting trusts are abolished except where the alienee named in the conveyance shall have taken the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed, with moneys belonging to another.[2] The statute, however, in order to prevent frauds, upholds a resulting trust in favor of the creditors of the party by whom the consideration money is paid, to the extent that may be necessary to satisfy their just demands.[3]

The policy of the law in thus requiring certain contracts, and especially those relating to real estate, to be reduced to writing and subscribed by the party to be charged, is founded in wisdom. The common law had forbidden a resort to parol evidence to vary, contradict or explain a written instrument, for reasons founded on the fallibility of memory.[4] The same reasons exist in relation to the proof of the entire contract; and hence, in relation to cases within the statute, unless there be some circumstances which remove the danger against which the statute was intended to guard, or some new equity arises in favor of their execution, parol contracts relative to real estate cannot be enforced. Before the statute of frauds, it has been shown by learned writers, that courts of equity were not in the habit of enforcing specifically parol contracts for the sale of real estate, unless the same were confessed in the answer, or, they had been partly performed.[5]

It is not upon any assumed power of dispensation, that courts of equity entertain jurisdiction, and compel the performance of agreements within the statute of frauds, and for the breach of which no action would lie at law. Courts of equity, as well as courts of law, are alike bound by the statute. But whenever they intervene to enforce contracts, not made in conformity to the statute, they do so, not out of disregard to the act, but for the purpose of administering equities which exist in subordination to

[1] 2 R. S. 135, § 2.
[2] 1 R. S. 728, § 53.
[3] Id. §§ 51, 52.
[4] 1 Phil. Ev. 561.
[5] Sugden's Vendors, ch. 4, § 2, pp. 107, 108. Greenl. Ev. § 262.

its spirit, and in no respect inconsistent with its policy, or when the parties themselves have waived its protection.

The modification of legal rules, which occur the most frequently in administering the equity of specific performance, are those where parol contracts relative to land are enforced on the ground that they have already been performed in part; in disregarding *time* as of exclusive importance; and of allowing a conveyance with compensation for defects. To these may be added the further rule, that where a parol contract is definitely stated in the bill, and admitted in the answer, and the statute is not urged as a bar, a specific performance will be enforced.

In the first place, when the answer allows the bargain to be complete, and does not insist on any fraud, there can be no danger of perjury. If the agreement be specifically set forth in the complaint, and admitted in the answer, there can be no objection to the decree for a specific performance.[1] Whatever may be the rule elsewhere, there can be no doubt that in this state, under the code, the defendant, unless he chooses to demur, can be compelled to answer whether the agreement set forth in the complaint was ever made or not.[2] And if the answer merely refrains from controverting the matters set forth in the complaint, those matters are taken as true for the purpose of the suit.[3]

Under the former practice of courts of equity, the statute of frauds might have been plead to a bill for the specific performance of an agreement. If it appeared on the face of the bill that the agreement was within the statute of frauds, and no sufficient equity was set up entitling the complainant to a decree for a specific performance, the objection might properly be taken by demurrer. And, in either case, the defendant, instead of pleading or demurring, might have answered, and insisted in his answer, on the protection of the statute.[4] But, it is believed, that under the code, this latter mode cannot now be adopted. The defendant must either demur to the complaint, if enough is not stated therein to entitle the complainant to the relief prayed, or he must set up in his answer the facts which constitute his defense, in ordinary and concise language, without repetition, unless he rests his defense upon the denial of the material allegations of the complaint.[5]

There are three grounds on which the plaintiff, when an agreement by parol for the sale of land is admitted in the answer, may be well entitled to the relief prayed; 1st, the admission of the agreement, by the

[1] 1 Fonb. Eq. B. 1. ch. 3, § 8, note d.
[2] Code of 1852, §§ 156, 143, 149.
[3] Code, § 168.
[4] Cozine v. Graham, 2 Paige, 177. Harris v. Knickerbacker, 5 Wend. 638.
[5] Code, §§ 149, 143

defendant, takes the case out of the mischief against which the statute was intended to guard; 2d, the agreement, although originally by parol is now reduced to writing, and subscribed by the party in his sworn answer; and 3d, the defendant, by admitting the agreement, and not insisting on the statute, either by answer or demurrer, may be taken as having waived it, upon the well known maxim, *quilibet renunciare potest juri pro se introducto.*[1] A man may, on principle, as well renounce the benefit of the statute of frauds as a defense, as the statute of limitations, or a discharge in bankruptcy.

But though the admission of the agreement be a sufficient ground on which to found a decree for specific performance, yet the agreement so admitted must correspond with the contract set forth in the bill, or a specific performance will not be decreed.[2] If the contract admitted in the answer varies in a manner *essentially affecting the contract*, relief cannot be granted. But if the variation in the terms does not enter into the substance of the contract, a decree will be made.[3] Thus, where the bill alleged that the contract sought to be enforced, required the purchase money to be paid in seven annual installments *with interest annually*, from the date of the contract, and the answer wholly denied that *interest* was reserved by the contract, although it admitted that the purchase money was to be paid in seven annual installments, it was held that the admission in the answer did not entitle the complainant to the specific performance of the agreement set out in the bill. The variance was too far material to be disregarded.[4] In such case, if the plaintiff wishes to avail himself of the agreement confessed by the answer, he should amend his complaint so as to conform to it.[5]

It is a well settled doctrine of courts of equity, that a parol contract for the conveyance of real estate, void by the statute of frauds, will, if partly executed by the party seeking relief, be specifically enforced. The principle in this class of cases is, that if one of the contracting parties induces the other so to act, that if the contract be abandoned, he cannot be restored to his former position, the contract must be considered as perfected in equity and a refusal to complete it at law, is in the nature of a fraud.[6]

[1] 1 Fonb. Eq. B. 1, ch. 3, § 8. Broom's Maxims, 546. Harris v. Knickerbacker, 5 Wend. 638.

[2] Harris v. Knickbacker, 5 Wend. 638.

[3] Id.

Id.

[5] Byrne v. Romaine, 2 Edw. Ch. R. 445.

[6] Newton v. Swazy, 8 N. H. 9. Annan v. Merrit, 13 Conn. 478. Pugh v. Good, 3 Watts & Serg. 56. Harris v. Knickerbacker, 5 Wend. 638. Parkhurst v. Van Cortland, 14 J. R. 15. Tilton v. Tilton,

But though this principle be well established, as a general rule, the application of it to particular cases is not free from difficulty. At an early day *part payment* of the purchase money was thought to be an act of part performance, taking the case out of the operation of the statute.[1] This has been overruled by later cases.[2] A part payment does not place the party in a condition in which he cannot be restored to what he has lost, because he can obtain compensation in a court of law. The statute of frauds, moreover, by making special provision for a part payment on the sale of goods, and no corresponding provision on the sale of real estate, seems to imply that a *partial* payment in the latter case does not take the case out of the statute.[3] The foregoing remarks apply to a case of *partial* payment of the consideration. But if the *whole* purchase money be paid by the vendee and accepted by the vendor, it would seem, on principle, that the latter should be compelled to execute the contract. An entire performance by either party, raises an equity in his favor to a corresponding performance by the other party. It is a waiver of all objection to the contract; and the party who has thus accepted a performance, cannot withhold an execution on his part, without being guilty of a fraud.[4]

In one case the vice chancellor of the first circuit, after remarking that the payment of the consideration was not in general deemed such a part performance as to relieve a parol contract from the operation of the statute, took a distinction between a payment in money, and a payment in labor and services. In the former case, as the re-payment would place the parties in the same situation in which they were before, he thought the payment should not be treated as an act of part performance; whereas in the latter, as the value of the labor and services were uncertain, and could not be measured by any certain standard, and it was thus out of

9 N. H. 386. 1 Fonb. Eq. B. 1, ch. 3, § 8, notes a, b. Philips v. Thompson, 1 J. Ch. R. 131. German v. Machin, 6 Paige, 288. Lowry v. Tew, 3 Barb. Ch. R. 407.

[1] Lacon v. Mertins, 3 Atk. 4. Main v. Melbourne, 4 Vesey, 720. 1 Bridgman's Digest, 62, § 412. Wetmore v. White, 2 Cai. Cas. in Error, 109. 1 Fonb. Eq. B. 1, ch. 3, § 8, note e.

[2] Sugden's Vendors, ch. 3, § 3, 107–112. Clinan v. Cooke, 1 Sch. & Lefr. 25, 40, 41. Coles v. Trecothick, 9 Ves. 234, 242.

[3] Compare 2 R. S. 135, § 8, with § 3 on p. 136.

[4] Pierce v. Nichols, 1 Paige, 244. Rhodes v. Rhodes, 3 Sand. Ch. R. 279.

The rules stated in the text are supposed to be law in New-York and most of the states. In Massachusetts, jurisdiction to enforce performance of a parol contract for the sale of land, when there has been a part performance, or a full performance has been declined, on the ground that it is not conferred by the statute of that state, vesting the supreme court with chancery powers. Brooks v. Wheelock, 11 Pick. 439.

the power of the other party to restore the party who had rendered the services to the same condition he was in before the services were rendered, he thought the case was clearly within the rule which governs the court in decreeing the specific performance of contracts.[1] But this distinction is not founded in principle. Whether the purchase price of real estate be money, or services to be rendered in taking care of a sick person, during his lifetime, as in Rhodes v. Rhodes, the result is precisely the same, when the entire services have been performed, as when, in the other case, the money has been paid. The contract is, in both cases, fulfilled by the purchaser.

The act of part performance which raises an equity in favor of the party to a complete performance, should be an act unequivocal in its character, and be done solely with reference to the agreements being carried into full effect. Thus, where the purchaser takes possession of the lands sold by virtue of the agreement, with the assent of the vendor, a court of equity will decree a specific performance; and, especially, if improvements on the premises be made at the expense of the party thus taking possession, on the faith of the fulfillment of the agreement.[2]

The doctrine on this subject was thus expounded by Chancellor Walworth in a recent case:[3] "The principle upon which courts of equity hold that a part performance of a parol agreement is sufficient to take a case out of the statute of frauds, is that a party who has permitted another to perform acts on the faith of an agreement, shall not be allowed to insist that the agreement is invalid, because it was not in writing, and that he is entitled to treat those acts as if the agreement, in compliance with which they were performed, had not been made. In other words, upon the ground of fraud in refusing to execute the parol agreement after a part performance thereof by the other party, and where he cannot be placed in the same situation that he was in before such part performance by him. Taking possession under a parol agreement, and in compliance with the provisions of such agreement, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was in before, has always been held to take such agreement out of the operation of the statute of frauds."

The party who goes into possession of premises under a contract to purchase, is at law a tenant at will to the owner of the legal title. On refusing to comply with the agreement, he becomes at once a trespasser,

[1] Rhodes v. Rhodes, Sandf. Ch. 279, 284.

[2] Parkhurst v. Van Cortland, 14 J. R. 15. 1 Fonb. Eq. B. 1, ch 3, § 9.

[3] Lowry v. Tew, 3 Barb. Ch. R. 413. Wetmore v. White 2 Caines' Cas. in Error, 87. Foxcraft v. Lister, 2 Vern 456

not entitled to notice to quit, and liable to be turned off by an ejectment. But if he is in under a written agreement, made by the owner, to sell and convey the premises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered as the owner of that title for which he contracted, and which the vendor is able to give him.[2]

To entitle a party to take the case out of the statute, on the ground of part performance of the contract, he must make out by clear and satisfactory proof the existence of the contract, as laid in his bill, and the act of part performance must be of the identical contract set up by him. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill.[3] Whether the agreement be in writing or by parol, it should, in order to entitle the party to a specific performance of it, be certain in its terms and mutual in its character.[4]

The wisdom and policy of the rule, allowing part performance of a parol contract to take the case out of the statute of frauds, have been often questioned.[5] In cases where the contract is not admitted by the answer, the trial of the cause is attended with all the evils which the statute was intended to prevent. On one occasion, the chancellor observed, that the beneficial provisions of the statute of frauds have been sufficiently broken in upon already; and the doctrine of part performance should not be extended to new cases which do not come clearly within the equitable principles of previous decisions.[6]

The general rule in equity is the same as at law, that parol evidence is inadmissible to contradict, vary or explain the terms of a written contract, except in an action to reform it. A contract cannot rest partly in writing and partly in parol. What was said at the time of making the contract and all antecedent conversations, are merged in the written contract.[7]

There is a settled distinction between the case of a vendor coming into a court of equity to compel a vendee to performance, and of a vendee resorting to equity to compel a vendor to perform. In the first case, if

[1] Smith v. Stewart, 6 J. R. 46, 49.

[2] Lowry v. Tew, 3 Barb. Ch. R. 414.

[3] Philips v. Thompson, 1 J. Ch. R. 131. Parkhurst v. Van Cortland, 14 J. R. 15.

[4] German v. Maichin, 6 Paige, 288.

[5] Lindsay v. Lynch, 2 Sch. & Lefr. 4, 5, 7. Forster v. Hale, 3 Ves. 712, 713.

[6] German v. Machin, 6 Paige, 293. Cooth v. Jackson, 6 Ves. 27.

[7] 1 Phil. Ev. 561, 567. C. & H. Notes, 1467. Adams v. Wilson, 12 Metc. 135. Parkhurst v. Van Cortland, 1 J. Ch. R. 283. S. C. in error, 14 J. R. 15.

the vendor cannot make out a title, as to part of the subject matter of the contract, equity will not compel the vendee to perform the contract *pro tanto*. But where a vendee seeks a specific execution of an agreement, there is much greater reason for affording him the aid of the court, when he is desirous of taking the part to which a title can be made.[1]

In cases where the application for relief has come from the vendee, the courts have not been inclined to avoid the exercise of jurisdiction, if the case could be reasonably brought within the range of previous determinations. In a recent case in England, in a suit for the specific performance of a parol agreement for a lease of a farm to be granted by the defendant to the plaintiff, it was alleged in the bill that by the terms of the agreement the plaintiff was to drain the land at his own expense, and was to lay down a certain arable field in pasture. The plaintiff entered upon the farm shortly after the agreement was made, and expended a considerable sum in drainage and repairs, and also laid down the field in pasture. That field was subsequently severed from the farm, and an abatement of the rent was made in respect of it. The vice chancellor was of opinion, upon the facts, that so much of the agreement set up in the bill as related to the laying down of the field in pasture was not proved, and consequently the agreement as proved differed from that alleged, and he dismissed the bill.[2] On appeal to the lord chancellor, Lord Cottingham was of opinion, upon the facts, that there was sufficient evidence of the agreement, and he reversed the decision of the court below, and referred it to a master to settle a lease pursuant to the terms of the agreement. In pronouncing his judgment, his lordship indicated a willingness rather to extend than to contract, the jurisdiction. "Courts of equity," he observed, "exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting the party to escape from the engagements he has entered into upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and with that object, it has at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect what the terms of it really were."[3] This case did not adopt any new principle. It merely applied to conflicting evidence liberal and enlight-

[1] Waters v. Travis, 9 J. R. 450. Sutherland v. Briggs, 1 Hare, 34.

[2] Mundy v. Joliff, 9 Sim. 413.

[3] Mundy v. Joliff, 5 Myl. & Craig, 177.

ened views, without seeking to introduce any new rule with reference to this important branch of equity jurisprudence.

On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and by that means to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake, a decree for specific performance of such an agreement would be unjust.[1] In one case Lord Hardwicke said, an omission in an agreement by mistake, stood upon the same ground as an omission occasioned by fraud.[2]

With respect to this class of cases, the propriety of showing an omission, or mistake, or surprise, by a defendant in answer to a bill for a specific performance, does not seem to have been doubted. But there is another class of cases where the object of the parol proof is to correct mistakes in agreements in aid of the plaintiff's bill for specific performance. Lord Hardwicke, in Joynes v. Statham, (*supra*,) seemed to think it might be done. But such proof has been sometimes rejected, when introduced on the part of the plaintiff to sustain his bill.[3] Chancellor Kent, on the contrary, held, that a mistake might thus be corrected on the application of the plaintiff, and the agreement so corrected enforced specifically, and that there would be a most deplorable failure of justice, if the mistake could only be shown and corrected when set up by a defendant to rebut an equity.[4] Why, he justly asks, should not the party aggrieved by a mistake in the agreement, have relief as well when he is plaintiff, as when he is defendant? It cannot make any difference, in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes, (and of that there is no doubt,) the agreement when corrected and made to speak the real sense of the parties ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties.[5] And Chancellor Walworth, in

[1] Gillespie v. Moon, 2 J. Ch. R. 598. Joynes v. Statham, 3 Atk. 388. The Marquis of Townsend v. Stangroom, 6 Ves. 328. Ramsbottom v. Gordon, 1 Ves. & Beame, 165. Clowes v. Higginson, 1 id. 524.

[2] Joynes v. Statham, 3 Atk. 388. Ramsbottom v. Gordon, 1 Ves. & B. 168.

[3] Higginson v. Clowes, 15 Ves. 516. Woolam v. Hearne, 7 Ves. 211. Clinan v. Cooke, 1 Sch. & Lef. 39.

[4] Gillespie v. Moon, 2 J. Ch. R. 599. Keisselbrack v. Livingston, 4 id. 148. Gooding v. M'Allister, 9 How. Pr. R. 123.

[5] Keisselbrack v. Livingston, 4 J. Ch. R. 148.

a later case, assumed that the court had jurisdiction, on a bill for a specific performance, if it was properly framed, to correct such error in the agreement as was the result of fraud, accident or mistake, and decree its execution in the corrected form.[1]

It sometimes happens that a written agreement, subsequently to its execution, is varied by a parol contract between the parties. In such cases, it is said that the variation, to be available as a defense, must be accompanied by such a part performance as would enable the court to enforce it if it were an original, independent agreement;[2] subject, nevertheless, to the doctrine of equity, which allows parties by their acts to vary the original agreement in respect of matters relating to title and the time for completion.[3]

A parol rescission of a written contract may be set up in bar to a bill for a specific performance.[4]

In like manner a party may, by parol, waive his right to call for a specific performance of his contract; but such waiver must be clearly and distinctly proved.[5] So a party may, voluntarily and by parol, abandon an agreement in writing for the sale or exchange of lands, with the assent of the other party, because he is not in a situation to perform the same; and if he does so, he cannot afterwards demand a specific performance.[6]

It was said by Lord Macclesfield, that in cases of fraud equity would relieve against the words of the statute; and he put a case, and said, if one agreement in writing should be prepared and drawn, and another fraudulently and secretly brought in, and executed in lieu of the former, in this or such like cases of fraud, equity would relieve;[7] but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statute making these promises void, equity will not interfere.[8]

The court will not decree a specific performance, on the application of the vendor, when he cannot make a clear and undoubted title to the premises, unless the purchase has been made at the risk of the vendee as to the title, or the latter has agreed to accept such title as the vendor was able to give. In general, however, it is not necessary for the complainant to show that he was able to give a good title at the time of making the agreement to sell, or even at the commencement of the suit. It will be sufficient if he can give a perfect title at the time of the decree, or at the

[1] Coles v. Brown, 10 Paige, 535. Id. 342

[2] Price v. Dyer, 17 Ves. 356.

[3] Dart on Vendors, 488.

[4] Walker v. Whateley, 2 Humphrey, T. R. 119. England v. Jackson, 3 id. 584.

[5] M'Corkle v. Brown, 9 Sm. & Marsh. 167.

[6] Baldwin v. Salter, 8 Paige, 473.

[7] Vicountess Montacute v. Maxwell. 1 P. Wms. 620.

[8] Id.

time when the master makes his report.[1] And this, too, is a good answer to the bill of the vendee to rescind the contract. For though the vendor may not have been able to convey at the time he made the contract, or at a later day when the vendee called for performance, yet, if he can give a good title at the time of the decree, the complainant must accept it; but in that case he will be entitled to an equitable compensation for the delay.[2]

The vendor may maintain a bill for a specific performance, though it consists only in the payment of money; especially when the contract is lost, and the bill is for discovery as well as relief.[3] In such case, when the bill charges that the contract, which was lost, was executed by the complainant and the vendee, and sets forth its contents, and the defendant denies the execution of any *such* contract, but states that the contract was executed by himself only, and points out no other difference, it seems he admits the contents of the agreement as charged in the bill.

It has already been said that equity will sometimes decree the execution of an agreement, with a compensation for defects. The vendor, it has been shown, when he seeks relief against the vendee, must himself be able to perform the contract on his own part.[4] A mere trifling, immaterial defect, will not defeat a decree. If the defendant obtain by a performance the same title which he expected to obtain when he made the contract, a performance will be decreed.[5] Thus, when the land sold was subject to a fine for alienation, of which the vendee was aware, but which the scrivener omitted to mention in the agreement, the court in decreeing performance refused to require compensation to be made.

So it is no objection to the vendor's title that the conveyance under which he holds reserves minerals and water privileges, if there be no such things on the land. A reservation of a peppercorn or other nominal rent, or a nominal fine reserved on alienation, is no objection to the title; but a pre-emptive right of purchase reserved is.[6]

But where the vendor has contracted to convey a title to a tract of land, the title to a part of which fails, the vendee may claim a specific per-

[1] Brown v. Haff, 5 Paige, 241. Langford v. Pitt, 2 P. Wms. 630. Clute v. Robinson, 2 J. R. 595. Coffin v. Cooper, 14 Ves. 205. Seymour v. Delancy, 3 Cowen, 445. Dutch Church v. Mott, 7 Paige, 77.

[2] Pierce v. Nichols, 1 Paige, 641.

[3] Crary v. Smith, 2 Comst. 60, 64.

[4] Brown v. Haff, 5 Paige, 235, and see references, ante.

[5] Winne v. Reyno'ds, 6 Paige, 407.

[6] Id.

formance as to the residue of the land, with compensation in damages for the part the vendor is unable to convey.[1]

Where the vendor never had title to the land contracted to be sold, or where he has conveyed the same subsequent to the making of the contract, so that he has not the power specifically to perform his contract, *and that fact is known to the vendee*, the latter cannot file a bill in equity, for the mere purpose of obtaining compensation in damages for the non-performance of the contract by the vendor; but he must resort to his remedy at law for that purpose.[2] But where the defendant deprives himself of the power to perform his contract specifically, *during the pendency of a suit* against him, to compel such performance, the court will retain the suit; and will award to the complainant a compensation in damages, for the non-performance of the contract by the defendant.[3] The principle on which this is based, is to prevent a multiplicity of suits. Besides, the plaintiff, who had a good cause of action when his bill was filed, ought not to be turned out of court, by the mere act of the defendant, without either the relief for which he originally filed his bill, or a compensation in lieu of it.[4]

While a court of equity does not entertain jurisdiction where the sole object of the bill is to obtain a compensation for the breach of a contract, except when the contract is of equitable cognizance merely, it would seem that if the complainant filed his bill in good faith, supposing at the time he instituted his suit, that a specific performance could be granted, and *not knowing* that the defendant had previously parted with the title, the bill may be retained for compensation.[5]

The plaintiff who seeks for the specific performance of an agreement must show that he has performed, or offered to perform on his part, the acts which formed the consideration of the alleged undertaking on the part of the defendant.[6] For if the plaintiff will not, or through negligence cannot perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual.[7]

It is upon similar reasoning, that where the plaintiff has shown a backwardness in performing his part of the contract, equity will not decree a specific performance in his favor, especially if circumstances are altered.[8] The rule which withholds the aid of a court of equity from a party who has been guilty of negligence in performing his own part of the agree-

[1] Moss v. Elmendorf, 11 Paige, 277.
[2] Id. Hatch v. Cobb, 4 J. Ch. R. 559. Kempshall v. Stone, 5 id. 193.
[3] Moss v. Elmendorf 11 Paige, 288.
[4] Woodward v. Harris, 2 Barb. 439.
[5] Id.
[6] Colson v. Thompson, 2 Wheat. 326
[7] 1 Fonb. Eq. B. 1, ch. 6. § 2.
[8] Id.

ment, is founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that a party may disregard his own part of a contract, and obtain relief in equity from the penalty of his gross negligence, is injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of the court. The maxim, *vigilantibus non dormientibus, leges subveniunt*, is not without good sense in its general bearing; but it has peculiar force and pertinence in a case where specific performance of agreements is sought. In a country where the value of real estate is fluctuating, and where competition, enterprise and speculation are constantly changing the relative importance of different kinds of business, as well as the relative value of property, parties ought not to be permitted to lie by and speculate on their own contracts, fulfilling them if advantageous, or disregarding them if their interest seems to lead in that direction.[1] Accordingly, if the plaintiff has been guilty of gross laches, or if he has not applied for relief until after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed. A court of equity will not administer relief to gross negligence any more than a court of law.[2] The party, to entitle himself to the aid of the court, for the specific execution of a contract, should show himself ready and desirous to perform on his part.[3] And if he voluntary abandons a written agreement, with the assent of the other party, though the abandonment be by parol, he cannot afterwards demand a specific performance[4] Nor will equity interpose if the agreement has not been insisted on for many years.[5]

The question whether time is of the essence of the contract, may arise as well in relation to personal as to real property. A court of equity, in holding that time is not of the essence of a contract, proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretense or evasion. But that principle can have no application to a case of a contract for the delivery of the scrip of government stock, where from the nature of the subject the value is exposed to daily variation, and a contract which was disadvantageous to the plaintiff on one day, might be highly advan-

[1] Smedberg v. Moore, 26 Wend. 247. Benedict v. Lynch, 1 J. Ch. R. 375, 376, 379. Watts v. Waddle, 6 Peters, 389.

[2] Brashier v. Gratz, 6 Wheat. 528. Pratt v. Carroll, 8 Cranch, 471. King v. Hamilton, 4 Peters, 311, 329.

[3] King v. Hamilton, 4 Peters, 329.

[4] Baldwin v. Salter, 8 Paige, 473. 1 Fonb. Eq. B.1, ch. 6, § 2, note E. Goman v. Salisbury, 2 Vern. 240. Botsford v. Burr, 2 J. Ch. R. 416.

[5] Powell v. Hankey, 2 P. Wms. 82.

tageous on another. In such cases, time may be of the essence of the contract.[1]

In contracts relative to real estate, it is not always an indispensable requisite to the granting of relief in equity, that the party seeking relief has not himself performed precisely at the day. If he has not been guilty of gross neglect, if his laches can be reasonably explained, and be shown to be consistent with fairness and good faith, if the delay can be compensated to the other party, and time has not been made material by the contract of the parties, a court of equity will still afford relief.

Where, in a contract for the sale of lands, the purchase money is to be paid or secured, and the conveyance executed on a particular day, and neither party performs, or offers to perform on that day, neither can maintain an action at law upon the contract. In such case, however, either party may claim specific performance in equity, on making the offer incumbent on him in the bill; and the failure to make a tender, before the commencement of the suit, will only affect the question of costs.[2]

These principles result from the doctrine that time is not, in general, the essence of the contract, and may in a court of equity, under certain circumstances, be disregarded. A court of equity frequently decrees specific performance, when the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed; as in cases where the terms of the agreement have not been strictly performed on the part of the party seeking specific performance, and to sustain an action at law performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case.[3] And again, in another case,[4] Lord Redesdale said: The courts, in all cases of contracts for estates in land, have been in the habit of relieving, where the party, from his own neglect, had suffered a lapse of time, and from that, or other circumstances, could not maintain an action to recover damages at law. And even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed; nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of equity have, therefore, enforced contracts specifically, where no action for damages could be maintained, for at law the party plaintiff

[1] Doloret v. Rothschild, 1 Sim. & Stu. 590.

[2] Stevenson v. Maxwell, 2 Comst. 409, 415.

[3] Davis v. Hone, 2 Schoales & Lefr 347.

[4] Lennon v. Napper, id. 684.

must have strictly performed his part, and the inconvenience of insisting upon that, in all cases, was sufficient to require the interference of courts of equity. They dispense with that, which would make compliance with what the law requires oppressive; and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus, in the case of an estate sold at auction, where there is a condition to perfect the deposit, if the purchase be not completed within a certain time; yet the court is in the constant habit of relieving against the lapse of time. And so in the case of mortgages, and in many instances, relief is given against mere lapse of time, when lapse of time is not essential to the substance of the contract.

There are some cases in which courts will not decree performance according to the letter, where from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. In such a case, the court may so modify the agreement as to do justice, as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires.[1]

On the principle that time is not of the essence of a contract for the payment of money, upon a contract for the sale of real estate, it has been held that a provision in a contract that, in case the vendee makes default in any of his payments, he shall forfeit all previous payments, and give up peaceable possession, affords no bar to a decree for a specific performance.[2]

But the parties may make time the essence of the contract; and they do so when a condition precedent is required to be performed by a certain day, before the vesting of an estate. In such case the vendor, after default of payment by the vendee, may convey to a third person, and no decree for a specific performance will be sustained, either against such subsequent purchaser or his vendor.[3] So where the agreement was that the vendee should erect a house on the premises by a certain day, or on that day pay a certain sum of money as the first payment of the purchase money, and he did neither; and when it was further agreed, that if the vendee failed to perform any of his covenants at the time or times limited, all his rights and interest in law or in equity in the premises should cease, and the vendor be discharged; and it was expressly stipulated that no deed should be given until the vendee performed on his part; it was held that the parties had

[1] The Mechanics Bank v. Lynn, 1 Peters, 383.

[2] Edgerton v. Peckham, 11 Paige, 352.

[3] Hatch v. Cobb, 4 J. Ch. R. 559 Kempshall v. Stone, 5 id. 193.

made time essential, and a bill filed by the vendee for a specific performance, after such failure, was dismissed.[1]

The rule applies equally to both parties, when time has been made material. Neither party can call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager.[2] But though time be made an essential ingredient in the contract, a strict compliance with it may be waived by either party, either by words or acts. The party seeking performance must show that he has used due diligence, or if not, that his negligence arose from a just cause, or has been acquiesced in.[3]

In cases where time is made essential, it is not necessary for the party resisting performance to show that he has sustained any particular injury or inconvenience by the delay of the plaintiff. It is sufficient if he has not acquiesced in it, but considered it as releasing him.[4]

Equity never compels a vendee to accept the conveyance of a doubtful title.[5] If there be a defect in the paper title of the vendor, it seems that if his possession under color of title has been sufficient to establish a good adverse possession, it is sufficient to be the ground of a decree.[6] If he is able to give a good title at the time of the decree, it has already been shown that that will suffice.[7]

The remedial agency of the court is often invoked by the vendor in the case of the sale of real estate at auction, and when the objection is that there has been a misdescription of the property. On this subject it has been held that if the title be good, and the description of it be substantially true, though in a slight degree defective or variant, a specific performance of the contract will be decreed.[8] Thus, where two adjoining lots of land were sold together, in one parcel, for one price, and on one of the lots were buildings which projected two feet on the other lot, it was held by Chancellor Kent that this was not so material a defect in the subject, or variation from the terms of the description at the sale, as would entitle the purchaser to abandon the contract. But as the projection was not so obviously visible as to conclude the purchaser, if he had exercised ordinary vigilance, and as the vendor, in the advertisement of sale, de-

[1] Wells v. Smith, 7 Paige, 22. Edgerton, v. Peckham, 11 id. 364. Benedict v. Lynch, 1 J. Ch. R. 370.

[2] Milward v. Thanet, 5 Ves. 720, note. Guest v. Homfray, 5 Ves. 818.

[3] Benedict v. Lynch, 1 J. Ch. R. 379.

[4] Id.

[5] Seymour v. De Lancey, 1 Hopk. 436. Hepburn v. Auld, 5 Cranch, 263.

[6] Seymour v. De Lancey, 1 Hopk. 436.

[7] Ante. See also Hepburn v. Auld, 5 Cranch, 262.

[8] King v. Bardeau, 6 J. Ch. R. 38.

scribed the buildings as being on one of the lots, the purchaser was entitled to *compensation* for any diminution of value arising from the projection upon the other lot, to be deducted from the price.[1] Courts of equity look to the substance of the contract, and do not allow small matters of variance or deficiency to defeat a claim in other respects founded in equity, especially when a full compensation can be made for the deficiency.[2]

On the other hand, if there be a substantial defect, either in the title or description of the property, unknown to the vendee, and in regard to which he was not put upon inquiry, the court will not compel the purchaser to complete the purchase, and accept compensation for defects, though they will allow him at his election to compel the vendor to execute the bargain, as far as in his power, and make compensation for deficiency.[3] While courts of equity will not permit the forms of law to be instruments of injustice, and will not allow advantage to be taken of a failure to perform *literally* the terms of a contract, they will, nevertheless, see that the purchaser shall not be compelled to take what he never intended to buy; that he shall not be required to complete a bargain, unless it can be carried into effect substantially as made.[4]

According to the settled practice in this state, which is different from that in England in that respect, on an executory contract for the sale of real estate, the party who is to give the deed has the same drawn at his own expense, but he is not bound to prepare it until the party who is to receive it is in a situation rightfully to demand it. And after such demand, the grantor is allowed a reasonable time for drawing and executing the deed; and he is then to hold it ready for delivery when called for, and is in no default until a second demand is made. The purchaser, nevertheless, may prepare the deed and tender it for execution, and then only one demand is necessary.[5] Indeed, the necessity for a *second* demand of a deed, in any case, after waiting a reasonable time, was strongly questioned by Gridley, J., in a recent case, if it was not directly overruled.[6]

[1] King v. Bardeau, 6 J. R. 38.

[2] 1 Fonb. Eq. B. 1, ch. 6, § 2, note E. Calcraft v. Roebuck, 1 Ves. jr. 221. Calverly v. Williams, 1 Ves. jr. 211. Dyer v. Hargrave, 10 Ves. 506. Guest v. Homfray, 5 id. 818 Halsey v. Grant, 13 id. 73. Drew v. Hanson, 6 id. 675. Hanbery v. Litchfield, 2 Myl. & K. 629. Hornblow v. Shirley, 13 Ves. 81. Osborne v. Bremar, 1 Desaus. 586. Wainwright v. Reid, id. 573.

[3] Hill v. Buckly, 17 Ves. 395. Paton v. Rogers, 1 Ves. & Beame, 351. Waters v. Travis, 9 J. R. 465.

[4] Halsey v. Grant, 13 Ves. 76, 77. Portman v. Mill, 2 Rus. 570; and see cases under note (2), supra.

[5] Wells v. Smith, 2 Edw. Ch. R. 81 affirmed by chancellor, 7 Paige, 73. Fuller v. Hubbard, 6 Cowen, 1. Connelly v. Pierce, 7 Wend. 129.

[6] Carpenter v. Brown, 6 Barb. 147.

When a party gives notice to the plaintiff that he will not complete the contract on his part and abandons the agreement and refuses to perform, such refusal dispenses with the necessity of an offer, or a readiness to perform on the part of the plaintiff, as it shows that such a step would be an idle ceremony.[1] Even a strictly legal tender may be waived by an absolute refusal to receive the money, on the principle that no man is bound to perform a nugatory act. An offer and readiness to perform, on the part of the plaintiff, is enough; especially when the defendant refuses to convey at all. Even the performance of a condition precedent need not be averred, where performance was waived or prevented by the party to be benefited by it.[2]

After what has been said, it scarcely need be added, that if a plaintiff has failed to perform his part of an agreement, or if it has become impossible to perform it, he cannot insist on a specific performance.[3]

But if the plaintiff has performed so much of his part of the agreement that he cannot be put in *statu quo*, and is in no default for not performing the residue, or is prevented from completing it, by the default of the defendant, he is entitled to a specific performance.[4]

In discussing the doctrine with respect to enforcing specifically contracts in relation to real estate, which are within the statute of frauds, we have necessarily anticipated much that has reference to contracts not within the statute. The authorities which are used to illustrate the principles which govern in the former case, often contain the doctrine which governs in the latter. If an agreement for the sale of real estate be made by proper parties, able and willing to contract, and be in the forms prescribed by law, and be *certain* and *defined*, *equal*, *fair and just in all its parts*, it will in general be decreed to be specifically executed.[5] The circumstances under which such agreements will be enforced, and the grounds of objection which may be taken, growing out of a want of *mutuality*, *inadequacy of consideration*, *mistake*, *hardship*, *surprise and the like*, have been already considered, and need not be repeated. It is scarcely necessary to add, to what has already been said, that if the contract could be enforced between the original parties, it can be enforced by and against

[1] North v. Pepper, 21 Wend. 633. Carpenter v. Brown, 6 Barb. 151.

[2] Bellinger v. Kitts, 6 Barb. 281.

[3] 1 Mad. Ch. Pr. 331.

[4] Id. 1 Fonb. Eq. B. 1, ch. 6, § 3,

[5] Lord Walpole v. Lord Oxford, 3 Ves. 420. Buxton v. Lister, 3 Atk. 385. Underwood v. Hitchcox, 1 Ves. 279. Seymour v. Delancy, 3 Cowen, 445. S. C. 6 J. Ch. R. 222. St John v. Benedict, id. 111.

those who stand in legal privity with them, as the heir, devisee or purchaser, with notice.

A conveyance for a valuable consideration made *bona fide* to a third person, without notice of the agreement, and before it has been carried into effect by a deed, will pass the legal title to such grantee.[1] In such case the remedy is at law, and not in equity, because the party is disabled after such conveyance to execute the agreement in specie.[2] But should the vendor, while the contract remains executory, and while he is under an equitable obligation to enforce it, convey the premises to a third person, *with notice* of the contract and of his liability, the purchaser could enforce the contract by an action against the vendor and his vendee. The last purchaser in such case takes the estate, incumbered with the equitable right of the original contractor to a completion of his bargain.[3] The chancellor said, in Champion v. Brown, (supra,) that if A. enters into a contract to sell land to B., and afterwards refuses to perform his contract, and sells the land to C. for a valuable consideration, B. may, by bill, compel the purchaser to convey to him, provided he be chargeable with notice at the time of his purchase of B.'s equitable title under the agreement. (Lord Macclesfield in Atcherly v. Vernon, 10 Mod. 518. Winged v. Lofebury, 2 Eq. Cases Ab. 32, pl. 43. Taylor v. Stibbert, 2 Ves. jun. 437. Daniels v. Davison, 16 Ves. 249; 17 id. 433, S. C.) The rule that affects the purchaser is just as plain as that which would entitle the vendee to a specific performance against the vendor. If he be a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents should be bound by the decree. The purchaser from the vendor takes the estate subject to the charge, and so does a purchaser from the vendee, and he is equally responsible in respect to the estate. The vendor cannot make him personally liable for the purchase money, but the estate is liable; and if he be a purchaser with notice, it is the same thing, whether the estate had or had not been actually conveyed by the vendor.

The general principle on which this doctrine rests is, that equity looks upon things agreed to be done as actually performed, as money covenanted to be laid out in land to be in fact real estate, which shall descend to the heir.[4] It considers land directed to be sold and converted into money as money, and money directed to be employed in the purchase of land

[1] Waters v. Travis, 9 J. R. 463.
[2] Hatch v. Cobb, 4 J. Ch. R. 559.
[3] Champion v. Brown, 6 id. 402, 403. Boyd v. Vanderkemp et al. 1 Barb. Ch. R. 273.
[4] 1 Fonb. Eq. B. 1, ch. 6, § 9.

as land.[1] The rule must be understood with this qualification, that things are not considered in that light in favor of every body, but only for those who have a right to pray it may be done;[2] and that it does not apply, if the special purpose for which the money is directed to be laid out in land, or the land to be converted into money, fail.[3] It also considers the vendor, from the time the contract for the sale of real estate is consummated, as the trustee with respect to the land for the vendee, and the vendee, as to the purchase money, the trustee for the vendor, and that the latter has a lien on the land for the same.[4]

When money is agreed by articles to be laid out in land, the party who would have the sole interest in the land when bought may elect to have the money paid to him, and that it shall not be laid out in land.[5] And the rule is the same, in case of a *bequest* of money to be laid out in the purchase of land.[6]

It is observable, that when money is agreed and directed to be laid out in land, to be settled to particular uses, it will, while uninvested, be considered as land in regard to succession, and accordingly go to the *heir* of the person entitled to the inheritance in the land to be purchased, in the same manner as the land, if purchased, would have done;[7] until some person competent to dispose of the lands, under the limitation of the uses, shall clearly manifest and decide his intention to terminate the trust, and to dispose of, or have the universal fund again considered as mere personal property.[8]

And where a sum of money is given by the will of a testator, to be laid out in the purchase of lands, or of lands in a particular county, and after they are bought, to be settled upon such and such persons, if a bill is brought in equity the constant course of the court is to direct a purchase, and the produce of the money to go as the land itself, till purchased.[9] So, if there be a direction by will to purchase a particular estate, which is swallowed up by an inundation; or, suppose the will was to purchase an estate in such a county, and it cannot be procured, the money will not go to the executors, but in such manner as the rents and profits, when the land is purchased.[10]

[1] Craig v. Leslie, 3 Wheat. 563, 577.

[2] Crabtree v. Bramble, 3 Atk. 680, and n. 1. Guidot v. Guidot, id. 254, and n. 1.

[3] 1 Fonb. Eq. B. 1, ch. 6, § 9, note v. Ante, 47, 48.

[4] Champion v. Brown, 6 J. Ch. R. 403. Green v. Smith, 1 Atk. 572. Makreth v. Symmons, 15 Ves. 329. Swartout v. Burr, 1 Barb. S. C. R. 499.

[5] Benson v. Benson, 1 P. Wms. 130.

[6] Seeley v. Jago, id. 389.

[7] Att'y Gen. v. Milner, 3 Atk. 114.

[8] Earlom v. Saunders, Amb. 242. Bradish v. Gee, id. 229.

[9] Earl of Coventry v. Coventry, 2 Atk 269.

[10] Id.

The foregoing is sufficient to illustrate the general principles by which courts of equity are governed in decreeing the specific execution of agreements. The authorities to show that money agreed or directed to be laid out in land is to be considered as land, are very numerous, and he whole subject is very thoroughly discussed in many of the cases.[1]

SECTION II.

OF THE RE-EXECUTION AND CORRECTION OF AGREEMENTS.

WE will proceed now to the consideration of the doctrine of re-execution and correction of agreements, and of other matters not already discussed. The two first precede a decree for a specific performance, and the last results from an inability to perform the agreement, either in whole or in part.

The jurisdiction for re-execution and other similar relief arises, not only on a destruction or concealment by the defendant, but also on an accidental destruction or loss, when the missing instrument is such, that its non-production would perpetuate a defect of title, or would preclude the plaintiff from recovering at law.[2] This subject was considered, to some extent, under the head of accident and mistake. And it has already been incidentally alluded to in this chapter. And it has been shown that Chancellor Kent, on several occasions, entertained bills to reform an agreement, and to carry it into execution in its corrected state.[3] Similar doctrine has been held elsewhere. Thus, in North Carolina, it has been held that equity relieves against mistakes, as well as against frauds, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, when the plaintiff seeks relief, affirmatively, on the ground of mistake. As when the owner of two adjoining tracts of land having sold one of them, in describing the metes and bounds, in a deed executed to the purchaser, by mistake included both tracts: the proof of the mistake being perfectly

[1] 1 Fonb. Eq. B. 1, ch. 6, § 9, note t. Craig v. Leslie, 3 Wheat. 577, opinion of Washington, J., who has elaborately treated the whole subject.

[2] Adams' Eq. 166.

[3] Gillespie v. Moon, 2 J. Ch. R. 585. Keisselbrack v. Livingston, 4 id. 148. See ante, p. 280.

satisfactory, the vendee was decreed to convey to the vendor the tract of land not intended to be conveyed.[1]

Where the vendee contracted for the purchase of land and took possession, but neglected to pay the purchase money for nine months after it fell due, during all which time the vendor held the bond for the purchase money, and did not offer to surrender it, but recognized the contract as still subsisting, it was held, that having allowed the contract to subsist after the default, the vendor could not put an end to it, without a previous formal and reasonable notice to the purchaser, to come forward and fulfill it, or he would not hold himself bound. And it was held, that upon such purchaser paying the money, he could demand a specific performance from the vendor, or call for the legal title from a person who had purchased with full notice of the contract.[2]

It often happens that one or the other of the parties to a contract, for the sale of land, has assigned his right and title to a third person. In such case, if the assignee would entitle himself to a specific performance thereof, he must do every thing which his assignor would have been bound to do, if the contract had not been assigned; unless the person against whom the specific performance is claimed has relinquished his rights in favor of the assignee.[3]

A vendor of real estate has a lien upon the same for the unpaid purchase money. And when a decree is made for a specific performance of a contract of sale, the court will, if the vendor asks for it, direct a provision to be inserted in the decree, that if the vendee refuses to accept the conveyance and pay the purchase money, the premises may be sold by a master for the purpose of raising such purchase money; and that if the proceeds of the sale are insufficient to pay the amount due, the vendee shall pay the deficiency. Or the court may decree that if the vendee does not pay the purchase money, within such time as shall be directed by the court, he shall be foreclosed, or barred of his right to a specific performance of the contract.[4]

It has been shown that when the vendor has disabled himself to perform in whole or in part, the bill may, in some cases, be retained for compensation. But when a vendor, under a contract to sell to the plaintiff, conveyed to a third person with notice of the plaintiff's rights, a bill filed against the vendor and his vendee with notice in the alternative, for a specific performance or compensation, can be sustained only in the

[1] Newson v. Bufferlow, 1 Dev. Eq. 379. Wesley v. Thomas, 6 Har. & John. 24.
[2] Falls v. Carpenter, 1 Dev. & Batt. 237.
[3] Jones v. Lyndes, 7 Paige, 301.
[4] Clark v. Hall. id. 383.

former character. The subsequent purchaser, having admitted that he purchased with notice of the plaintiff's contract, is liable to a decree for a specific performance. The plaintiff is thus entitled to the land, with the improvements, if any, which the purchaser put thereon, upon the payment of the original purchase money and interest.[1]

The doctrine with respect to compensation, on bills for specific performance, will be more fully treated in a subsequent section.[2]

SECTION III.

OF RESCISSION, CANCELLATION, AND THE DELIVERING UP OF AGREEMENTS.

THE rescission, cancellation or delivering up of agreements, securities or deeds, is the converse of a specific performance. The equity to relief, in each case, originates in the fraud which, but for the interposition of the court, would be perpetrated upon the complaining party. The relief, however, in each case, cannot be demanded, as of strict right, but is granted or refused by courts of equity upon their own notions of what is reasonable and just, under all the surrounding circumstances.[3] And though, in strictness, a specific performance and a cancellation of an agreement be the opposites of each other, yet a court of equity is not bound to decree a specific performance in every case, where it will not set aside the contract; nor to set aside every contract that it will not specifically perform.[4] And it is generally agreed that the relief, by delivering up a contract, requires a stronger case, than to resist a specific performance.[5]

Nor will relief be granted universally, even though the defendant be in the wrong.[6] The plaintiff must also show a title to relief, beyond the mere technical breach of duty, which would confer a right of action at law. The court will, as has been seen already, decree a specific performance on the application of a vendee, either with or without compensation, when it would deny the like relief on the application of the vendor. And the court will, in like manner, order an agreement to be canceled, or set aside on the application of one party, and deny similar relief at

[1] Boyd v. Vanderkemp, 1 Barb. Ch. R. 273.

[2] See post, Sec. 4 of this Chapter.

[3] Mortlock v. Buller, 10 Ves. 292. Fonb. Eq. B. 1, ch. 3, § 9, note i.

[4] Id. M'Leod v. Drummond, 17 Ves. 167.

[5] Savage v. Brocksopp, 18 Ves. 337.

[6] Hamilton v. Cummings, 1 J. Ch. R. 517.

the instance of another.[1] The discretion which courts of equity exercise, in matters of this kind, is not a mere arbitrary discretion, but is a sound and reasonable discretion, and regulated upon grounds that make it judicial.[2] The court often considers whether the relief prayed would be attended with hardship or not; or whether a superior or inferior equity arises on the part of the person who comes for a specific performance.[3] And as it is a maxim of the court, that he who seeks equity must himself do equity, the court, in all cases, when the justice of the case requires it, imposes such terms upon the party, to whom relief is granted, as will fulfill the requirement of that maxim. A convenient illustration of this principle is found in the practice of the court, when not controlled by the statute, of refusing to entertain a bill, either for discovery or relief, by the borrower or other person standing in legal privity with him, on the ground of usury, without an offer to pay the sum actually loaned, with lawful interest.[4]

Although, in cases where an instrument is absolutely void, either by statute or by the principles of the common law, no action can be maintained thereon, and the other party has a perfect defense in a court of law, yet it has long been held that courts of equity will interpose, either by injunction, or by its plenary powers of setting aside, or canceling the agreement. The principle upon which relief seems to be granted in such cases is, upon the ground that equity will often interpose and *prevent* an injury which is impending over the complaining party. This is the doctrine on which bills, *Quia Timet*, are sustained; and it is thus expounded by an able writer upon equity jurisprudence:[5] "When a person is apprehensive of being subjected to a future inconvenience, probable or even possible to happen, or be occasioned by the neglect, inadvertence or culpability of another; or when any property is bequeathed to one, after the death of another in existence, and which the former is desirous of having secured safely for his use, against the effects of any accident which may happen to it previous to the accruing of his possession; in either of these cases a bill of the above description may be exhibited, which, in the one instance, will quiet the party's apprehension of a future inconvenience, by removing the causes which may lead to it; and, in the

[1] Cook v. Clayworth, 18 Ves. 12.

[2] Seymour v. Delancy, 3 Cowen, 505, per Savage, Ch. J. White v. Damon, 7 Ves. 35. Buckle v. Mitchel, 18 id. 111.

[3] Goring v. Nash, 3 Atk. 188. Finch v. Earl of Winchelsea, 1 P. Wms. 277.

[4] Rogers v. Rathbun, 1 J. Ch. R. 367. Tupper v. Powell, id. 439. Livingston v. Harris, 3 Paige, 528. S. C. on appeal, 11 Wend. 329. Post v. Dart, 8 Paige, 639. S. C. 7 Hill, 391, on appeal. Fanning v. Dunham, 5 J. Ch. R. 142 et seq.

[5] 1 Mad. Ch. Pr. 178. See post, CHAP. V, Sec. 3, *Of Bills Quia Timet.*

other, will secure for the use of the party the property, by compelling the person in the present possession of it to guaranty the same by proper security, against any subsequent disposition or willful destruction." It is under the former branch of the definition that the remedies we are considering are comprehended. The jurisdiction of a court of equity to set aside deeds and other legal instruments, which are a cloud upon the title to real estate, and to order them to be delivered up and canceled, appears to be now fully established.[1] It will do so, though the instruments be void at law as well as in equity. Much more, therefore, is the party entitled to relief in this court, if he have a defense which is of a purely equitable nature, and not available at law. So a person, who has a perfect remedy at law, to recover for the breach of an agreement connected with a note, if he cannot avail himself of it as a defense to an action on the note, can come into a court of equity to have the note canceled, and to recover the balance, if any, which may be due to him.[2]

The cases in which equity relieves, by setting aside or canceling deeds, bonds, or other securities, are when there has been actual fraud in the party defendant, in obtaining the deed or security; or constructive fraud against public policy, and the plaintiff is not a partaker in the fraud. It will also interpose in some cases of constructive fraud when public policy requires the agreement should not stand, though both parties have been alike guilty.[3] And there are other cases of constructive fraud where it will relieve, if the parties do not stand *in pari delicto*. Many of these cases have already been considered under the head of fraud, and need not be repeated.[4]

But the court in general will leave the parties to the consequences of their own act, and to the remedies afforded at law, if they stand *in pari delicto*.[5] Thus, after a verdict on a bond at law, equity will not relieve against it, or the judgment thereon, upon the ground that the consideration of it was an agreement by the defendant to cohabit with the plaintiff as his wife, and that she had violated that agreement.[6] Such agreement is void at common law, and cannot be enforced either at law or equity, nor will the court aid the obligor in getting relieved from it.

[1] Petit v. Shepherd, 5 Paige, 501. Ward v. Ward, 2 Hay. R. 226. Leigh v. Everhart's Executors, 4 Munroe's R. 380. Hamilton v. Cummins, 1 J. Ch. R. 517. Apthorp v. Comstock, 2 Paige, 482. Grover v. Hugell, 3 Russ. Ch. R. 432.

[2] Reed v. The Bank of Newburgh, 1 Paige, 215.

[3] Lord St. John v. Lady St. John, 11 Ves. 535.

[4] Loomis v. Cline, 4 Barb. 453.

[5] Bolt v. Rogers, 3 Paige, 154.

[6] Franco v. Bolton, 3 Ves. 368. Gray v. Mathias, 5 id. 286.

When a bill is filed for the delivering up or cancellation of a deed, or other instrument, on account of its being void, either by fraud, or as a forgery, it was usual if the fraud be denied to award an issue, and direct it to be tried by a jury. But it was nevertheless held, that it was discretionary with the court whether an issue should be directed or not.[1] And it was well settled that the court might, if it pleased, retain the cause and decide the matter of fact itself, without the intervention of a jury, except on bills for a divorce, or an issue *devisavit vel non*. There are numerous cases, says Chancellor Kent, in which a court of equity has set aside conveyances from persons of weak or diseased intellects, without referring the case to a jury; and all such cases rest upon the exercise of the undoubted jurisdiction and discretion of the court.[2] On a bill to deliver up a bill of exchange, improperly issued, where the testimony was clear, Lord Loughborough refused to award an issue, and determined the question of fact himself.[3]

But the present practice in New-York, under the constitution of 1846, is to try the issue in the same manner as issues in actions at law are tried.[4] A feigned issue no longer exists, but the actual issue raised by the parties must be tried by jury, unless the parties elect to have it tried by the court or referee.[5]

It was, however, before the adoption of the constitution, the most usual practice of the court to award an issue to try the validity of deeds, notes or other instruments alleged to have been forged, or obtained by fraud, or by undue influence, and the motion for a new trial, or for a judgment founded on the verdict, was properly addressed to the court awarding the issue.[6] The courts in this state in former years, before the constitution of 1846, awarded an issue to try the allegation of usury in a bond and warrant of attorney, on which judgment had been obtained, the fact of such usury being denied.[7] In like manner, they ordered an issue to try whether the bond and warrant of attorney, on which judgment was entered, was forged.[8] But the court was not in the habit of awarding an issue where an application was made to its equity powers for relief against a judgment, and there was no conflicting evidence or question of credibility

[1] Jervis v. White, 7 Ves. 413.

[2] Smith v. Carl, 5 J. Ch. R. 120. Newman v. Milner, 2 Ves. jr. 483.

[3] Id.

[4] Constitution of 1846, art. 6, § 10.

[5] Code of Procedure, §§ 266, 270, 272.

[6] Lansing v. Russell, 3 Barb. Ch. R. 325. S. C. 13 Barb. 510.

[7] Starr v. Schuyler, 2 J. R. 139. Wardell v. Eden, 2 J. C. 258. Gilbert v. Eden, 2 id. 280.

[8] King v. Shaw, 3 J. R. 142.

involved.[1] Nor when a motion was made to set aside a release granted in a cause *pendente lite*.[2]

As the ground of relief by cancellation, or delivering up of deeds and other agreements, is the danger that the rights of the complaining party will be put at hazard, or a cloud be cast over his title, if the instrument be suffered to remain, it was said by Chancellor Walworth, that if the objection appear upon the face of the writing or proceedings, through which the adverse party can alone claim any right to the complainant's land, it is not in law such a cloud upon the complainant's title as can authorize a court of equity to set aside or stay such proceedings.[3] Equity, in general, interferes only where the claim of the adverse party is valid upon the face of the instrument, or the proceedings sought to be set aside; as where the defendant has procured and put upon record a deed, obtained from the complainant by fraud, or upon a usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void. In such case, a use may, *prima facie*, be made of the instrument by the defendant prejudicial to the complainant. It thus creates a cloud upon his title which equity will remove.[4] On the same principle, a bill will not be entertained to deliver up a bill of exchange or bond, after an action has been brought and a recovery of judgment thereon been had at law, and the amount received.[5] By such recovery the instrument is merged in the judgment, and there no longer exists any well founded danger that it will be again put in circulation, or that the party will be subjected to any expense or trouble in relation to the same. The record will show that the instrument is no longer an available security. The case stands upon a different footing from forged securities, or those which are void for fraud and the like, where the invalidity of the instrument depends upon the proof of collateral facts resting in the memory of witnesses.

Chancellor Kent, on the contrary, at an early day, expressed the opinion that the weight of authority, and the reason of the thing, were equally in favor of the jurisdiction of the court, whether the instrument be or be not void at law, or whether it be void from matter appearing on its face, or from proof taken in the cause. And he thought the distinctions in this respect were not well founded.[6] It is every day's practice, he observed,

[1] M'Instry v. Thurston, 12 Wend. 222.
[2] Ferris v. Crawford, 2 Denio, 595.
[3] Van Doren v. Mayor &c. of N. Y., 9 Paige, 388. Simpson v. Lord Howden, 3 Myl. & Craig, 97. Gray v. Mathias, 5 Ves. 286. Bromley v. Holland, 7 id. 16, 20, 22.
[4] See foregoing cases.
[5] Threlfall v. Lunt, 7 Sim. 627.
[6] Hamilton v. Cummings, 1 J. Ch. R. 522.

to order instruments to be delivered up, of which a bad use might be attempted to be made at law, although they could not even there entitle the holders to recover. It is indeed not very apparent, why a doubt should have been started in some of the modern cases as to the general jurisdiction of the court, when we consider the uniform tenure and language of the more ancient decisions, and which do not appear to have turned upon the distinction, whether the instruments were or were not void at law. In Whittingham v. Thornburgh, (2 Vern. 206,) and Goddart v. Garrett, (id. 269,) and De Costa v. Scandret, (2 P. Wms. 170,) policies of insurance, procured by fraud, were ordered to be delivered up and canceled, though the fraud was equally a defense at law. And in another case, (Law v. Law, (Cases temp. Talbot, 140; 3 P. Wms. 391,) Lord Talbot ordered a bond to be canceled, and charged the defendant with costs, without deciding whether or not it was good at law.

It is quite clear that the cases on this subject cannot all be reconciled, except by the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense arising on its face may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case; and rendering a resort to equity highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of the court will still depend on a question of expediency, and not on a question of jurisdiction.[1]

The delivering up of deeds and other instruments to the party entitled to them, when they are improperly withheld, is an ancient head of equity jurisprudence. The heirs at law or devisees, or any party standing in legal privity with them, and who are entitled to the possession of the muniments of their title, may maintain a bill for the delivery to them of such title deeds.[2]

It is true an action at law will lie for illegally withholding deeds or other instruments in writing relating to the title of property; but in such case damages only can be recovered. Equity administers a better and more efficient remedy, by requiring the delivery of the instrument to the party to whom it belongs.[3]

[1] Hamilton v. Cummings, 1 J. Ch. R. 523.

[2] Harrison v. Southcote, 1 Atk. 539. Ford v. Peering, 1 Ves. jr. 72. Tanner v. Wise, 3 P. Wms. 296. Duncomb v. Mayer, 8 Ves. 320.

[3] Jackson v. Butler, 2 Atk. 306. Gray v. Cockerell, id. 114.

On the like principles, a remainderman, whose interest is expectant on a mere tenancy for life, may obtain the aid of a court of equity for the better security of his title, to have the deeds and writings relative to the estate, in the hands of tenant for life, taken from such custody and deposited in court. But where there are intervening estates between that of the tenant for life and the plaintiff, and his interest is remote, the court will not interfere in his behalf.[1]

It is no inconsiderable part of the duty of equity to *prevent* mischief.[2] Courts of law redress an injury after it has been perpetrated, by the infliction of damages, the fear of which, indeed, no doubt greatly tends to deter from the commission of wrong. Courts of equity, on the other hand, anticipate the evil, and by a seasonable interposition of their authority, prevent it. With a view to this object, bills *quia timet* are entertained, and various evils are prevented by injunction, which will be more fully discussed under the proper head.

On the same principle, courts of equity will decree the delivery up of deeds, or of securities for the payment of money, upon which the defendant might, against conscience, recover at law.[3]

The Revised Statutes,[4] Code of Procedure[5] and Rules of the Supreme Court,[6] have conferred upon the supreme court ample power to compel the parties, to any suit pending therein, to produce and discover books, papers and documents, in their possession or power, relating to the merits of any such suit, or of any defense therein. This renders a resort to a court of equity, in cases within these legislative provisions, in a great many instances unnecessary, but does not supersede the jurisdiction of courts of equity, in any case, and much less in cases not covered by the statutes. A similar legislative provision exists at this time in England.[7]

SECTION IV.

OF COMPENSATION AND DAMAGES.

WE will now bring this chapter to a close, by a few additional remarks on the subject of compensation and damages; a branch of equitable relief which is incidental, though not exclusively so, to bills for specific per-

[1] Ivie v. Ivie, 1 Atk. 431.
[2] 1 Fonb. Eq. B. 1, ch. 1, § 8, note y.
[3] Ryan v. Macmeth, 3 Bro. Ch. R. 15.
[4] 2 R. S. 199, § 21 et seq.
[5] Code § 388.
[6] Rules of Supreme Court, 8.
[7] 15 and 16 Vict. ch. 86. Flott v. Mullins, 15 L. & E. R. 350. 16 Jurist, 946.

formance. It has already been occasionally adverted to in discussing the subject of specific performance, and many of the adjudged cases on the subject have already been brought to our notice. It has been stated, in preceding pages, and may well be repeated, that where the object of the action is to recover damages alone, not connected with any peculiar equitable relief, the remedy is at law and not in equity.[1] The ground for the interference of a court of equity does not, in such case, exist, because there is no failure of the remedy at law.

But when the defendant, having entered into a contract to convey, subsequently puts it out of his power to perform, specifically, the bill will be retained, and an equivalent in damages awarded.[2] This doctrine must be understood with the qualification that the party puts it out of his power to perform, *after* the commencement of the suit. This seems to be the view taken of the case of Denton v. Stewart, (supra,) by Lord Eldon, and without which it cannot be supported.[3] Except in very special cases, it is not the course of proceeding in equity to file a bill for a specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue, or an inquiry before the master, with a view to damages.

The mode in which damages are assessed in such cases, is either by an issue to be tried by a jury, or by a reference to a master.[4] Under the practice in this state, the damages may doubtless be assessed by a jury, but the most convenient mode is by a reference. The same mode of assessing damages is doubtless applicable where the compensation only extends to the part wherein the defendant is unable to perform, the plaintiff being willing to accept such performance as the defendant is able to make, with compensation for deficiency.[5]

Whatever may be the rule elsewhere, and it cannot be denied that there is some conflict in the cases on the subject, a bill in equity will not lie for compensation alone, except in some peculiar cases, nor will an action for specific performance be retained for compensation, unless in cases where the defendant has put it out of his power, after the commencement of the suit, to fulfill the agreement in specie.[6] In this state,

[1] Boyd v. Vanderkemp, 1 Barb. Ch. R. 273. Clifford v. Brooke, 13 Ves. 131.

[2] Denton v. Stewart, cited 1 Fonb. Eq. B. 1, ch. 1, § 8, z. Greenaway v. Adams, 12 Ves. 395. Philips v. Thompson, 1 J. Ch. R. 150. Woodcock v. Bennett, 1 Cowen, 711.

[3] Todd v. Gee, 17 Ves. 275, n., 278. Hatch v. Cobb, 4 J. Ch. R. 560. Kempshall v. Stone, 5 id. 194.

[4] Woodcock v. Bennett, 1 Cowen, 755. Philips v. Thompson, 1 J. Ch. R. 151.

[5] Hepburn v. Auld, 5 Cranch, 262. Pratt v. Law, 9 id. 492, 494.

[6] Philips v. Thompson. 1 J. Ch. R. 151.

the controversy upon these points is, under our present practice, of no moment, and not worth the trouble of an examination of the authorities. If the complaint contains a cause of action, it is immaterial whether it be termed legal or equitable, whether it be for specific performance, or for compensation, or for both together. If it be sustained by the admission of the defendant, or by the testimony in the cause, the plaintiff is entitled to such relief as the nature of his claim and the justice of the case require.

The question with respect to the right to compensation, is not confined to cases where the plaintiff is the actor and prays for affirmative relief. It sometimes arises in behalf of a defendant in resisting the claim of the plaintiff, and is presented by way of set-off or recoupment. At common law, whoever takes and holds possession of land, to which another has a better title, whether he be a *bonæ fidei* or a *malæ fidei* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseizor, if he be a *bonæ fidei* occupant, may recoupe the value of the meliorations made by him against the claim for damages.[1] The New-York revised statutes have regulated the right of the plaintiff to mesne profits, consequent upon a recovery in an ejectment upon this equitable principle, adopting, with some modifications, the law as it then existed.[2] And the defendant is allowed to set off permanent improvements made on the premises, to the amount of the plaintiff's claim.[3] The action for mesne profits has always been deemed by the courts of law as an equitable action, in which the defendant is to be allowed an equitable defense.[4] The statute has limited the plaintiff's recovery to the rents and profits for six years, in estimating which, the value of the use by the defendant of any improvements made by him, shall not be allowed to the plaintiff.[5]

In analogy to these principles, when industrial accessions have been made to property, in good faith, by a person who has the legal title to the property, so that the real owner is compelled to resort to a court of equity to assert his equitable title to such property, the court acts upon the civil law rule of natural equity, and compels the complainant to compensate the adverse party for such industrial accessions, or improvements, as a condition of granting the equitable relief asked for in the suit.[6]

The law does not deprive the legal owner of property of the natural

[1] Green v. Riddle, 8 Wheat. 1. Coulter's case, 5 Co. 30. Jackson v. Loomis, 4 Cowen, 168. Putnam v. Ritchie, 6 Paige, 404.

[2] 2 R. S. 310, §§ 44 to 53.

[3] Id. § 49. Jackson v. Loomis, supra.

[4] Murray v. Gouverneur, 2 J. Cas. 438

[5] 2 R. S. 311, § 49.

[6] Putnam v. Ritchie, 6 Paige, 390.

accessions to it. It treats land as including not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees, herbage and water, or by the hand of man, as houses and other buildings.[1] He who owns the land, *prima facie*, is supposed to own all the buildings upon it, and which are parcel of the freehold.

But the rule of natural equity appears to be different in regard to industrial accessions, or permanent improvements, made upon the property of another by a bona fide possessor. By the rules of the civil law, the possessor of the property of another, who had erected buildings or made improvements thereon in good faith, supposing himself to be the owner, was entitled to payment for such improvements, after deducting from the value thereof a fair compensation for the rents or use of the property during the time he occupied it.[2] The Code Napoleon gives the owner of the soil, upon which buildings and works have been made by another, with his own materials, an election either to retain them, or to oblige such third person to remove them at his own expense. If he elects to retain them, he is bound to reimburse the other party for the value of the materials and the price of the work, without regard to the greater or less augmentation of value which the soil has received. If the buildings be erected by a party in good faith, the proprietor recovering the land shall not demand a demolition of the buildings, but shall have his election, either to repay the value of the materials and the price of the workmanship, or to reimburse a sum equal to the augmented value of the estate.[3] The rule to this extent has not been adopted in this country. The rule of natural equity is, however, constantly acted upon by courts of equity when the legal title is in the person who has made the improvements in good faith, and when the equitable title is in another who is obliged to resort to equity for relief. The court in such case acts upon the principle, that he who comes as a complainant to ask equity must himself be willing to do what is equitable.[4]

Whether this principle should be carried out in practice, in all cases, to the extent that it exists in the civil law, may, perhaps, admit of doubt. Chancellor Walworth, in Putnam v. Ritchie, said he had not been able to find any case, either in this country or in England, wherein the court of chancery had assumed jurisdiction to give relief to a complainant, who had made improvements upon land, the legal title to which was in the defendant, where there had been neither fraud nor acquiescence on

[1] Co. Litt. 4, a. 3 Kent's Com. 401.
[2] Putnam v. Ritchie, 6 Paige, 404. Puff. B. 4, ch. 6, § 6 Code Nap. art. 555. Bell's Law of Scotland, 130, art. 538. Rutherf. Inst. 71.
[3] Code Nap. § 555.
[4] Putnam v. Ritchie, 6 Paige, 405.

the part of the latter, after he had knowledge of his legal rights. And he expressed the apprehension that the introduction of that principle into the law of the court, in its application to future cases, might be productive of more injury than benefit.[1] On the other hand, Mr. Justice Story, whose labors have so much enlightened the world on the subject of equity jurisprudence, inclines to the adoption of the civil law rule.[2] In speaking of permanent meliorations and improvements made by a bona fide possessor, and of the propriety of sustaining a bill in his favor for relief against the true owner, he says, "that the denial of all compensation to such bona fide possessor in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take," says he, "the case of a vacant lot in a city, where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the orignal value of the land, under a title apparently perfect and complete; is it reasonable or just that, in such a case, the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another, who is in no default."

But, however strong and persuasive may be the equity of the civil law rule, the courts of this state have not gone to that extent in cases of this kind. They have contented themselves with the application of it in a qualified manner, by requiring a party who comes into equity for relief, against a party who has expended his money in the erection of permanent improvements on the estate, to do equity himself as a condition of the relief. There may, indeed, be a moral beauty in this and many other principles of the civil law; but the adoption of them, in their broadest extent, would change our habits of business, and unsettle principles which have ever been regarded as sound. The common law rule, moreover, leads to caution in the examination of titles, and operates as a restraint upon the appropriation of the property of others. The loss of compensation for industrial accessions to land of which the title fails, though apparently harsh and inequitable, is in truth but a penalty for an invasion of the rights of others. If one of two innocent persons must sustain a loss in such a case, it should be borne rather by him who did it, whether wickedly or not, than by him upon whom it was inflicted.

[1] Putnam v. Ritchie, 6 Paige, 405. 494; S. C. 2 Story's R. 605. 2 Eq. Juris.

[2] Brigl v. Boyd, 1 Story's R. 478, § 799, b, and note.

CHAPTER V.

OF BILLS OF INTERPLEADER, BILLS OF PEACE, BILLS QUIA TIMET AND BILLS TO MARSHAL SECURITIES.

SECTION I.

OF BILLS OF INTERPLEADER.

THE remedy by interpleader existed at common law; but it had but a limited scope. It happened in the case of a joint bailment by both claimants.[1] But, as the remedy at law has long since given place to a bill in equity for the same purpose, it seems unnecessary to devote any time to the ancient mode of proceeding.

A bill of interpleader, strictly so called, is, according to Chancellor Walworth, where the complainant claims no relief against either of the defendants, but only asks that he may be at liberty to pay the money, or deliver the property to the one to whom it of right belongs, and may thereafter be protected against the claims of both.[2] In such cases, the only decree to which the complainant is entitled, is a decree that the bill is properly filed; that he be at liberty to pay the fund into court, and have his costs; and that the defendants interplead and settle the matter between themselves.[3] Judge Sutherland, in delivering the judgment of the court of errors, in a certain case,[4] compiles from approved books of equity pleading and practice, and adopts as his own, this definition of the bill: It is, he says, defined to be a bill exhibited, where two or more persons claim the same debt or duty from the complainant by different or separate interests; and he, not knowing to which of the claimants he ought of right to pay or render it, fears that he may be damaged by the

[1] Crawshay v. Thornton, 2 Mylne & Craig, 1, 21.

[2] Bedell v. Hoffman, 2 Paige, 200.

[3] Id.

[4] Atkinson v. Manks, 1 Cowen, 703.

defendants, (as by paying his money to a wrong hand,) and, therefore, exhibits his bill of interpleader against them, praying that the court may judge between them, to whom the thing belongs, and that he may be indemnified. It claims no right in opposition to those claimed by the persons against whom the bill is exhibited, but only prays the decree of the court, to decide between the rights of those persons for the safety of the complainant.[1]

The nature of the allegations, therefore, says the learned judge, in every bill of interpleader, are, 1st. That two or more persons have preferred a claim against the complainant; 2d. That they claim the same thing; 3d. That the complainant has no beneficial interest in the thing claimed; and 4th. That he cannot determine, without hazard to himself, to which of the defendants the thing of right belongs.[2] A recent and approved writer on equity jurisprudence, has condensed the definition into these words: It is a bill filed for the protection of a person, from whom several persons claim legally or equitably the same thing, debt or duty; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is, that the conflicting claimants should litigate the matter amongst themselves, without involving the stakeholder in their dispute.[3]

The definition given by Mitford, Jeremy, Story and Eden,[4] is substantially the same. The origin of the remedy in equity is, that the legal remedy in such cases is inadequate, or that there is none at all.

Before proceeding to an examination of the adjudged cases on this subject, it may be well to observe that, in England, a recent statute has given power to the common law courts to administer relief, to a certain extent, in favor of a party sued in the courts of law, in any action of assumpsit, debt, detinue or trover, in the subject matter of which suit the defendant claims no interest; and when he denies collusion with either party, and is ready to bring the money into court, &c. The court make an order, on a proper application, for the third party to appear and state his claim, &c. And powers are given to the court to direct an issue, &c.[5] The jurisdiction in equity does not seem to have been superseded, or impaired, by this summary remedy at law, as will be seen more fully when the cases are examined.[6]

[1] Cooper's Eq. Pl. 45, 46. Har. Ch. Pr. 96. 1 Mad. Ch. Pr. 143.

[2] Atkinson v. Manks, 1 Cowen, 703.

[3] Adams' Eq. 202.

[4] Mitf. Eq. R. by Jeremy, 48, 49, 141, 142. Story's Eq. § 806. Eden on Inj. by Waterman, vol. 2, p. 393, 394, and notes.

[5] Stat. 1 and 2, Will. 4, ch. 58.

[6] Langton v. Horton, 3 Beav. 464.

In New-York, a summary remedy was given by the code of 1851, but it is believed that it does not cover all the cases to which bills of interpleader, and bills in the nature of bills of interpleader were applied.[1] The enactment is as follows: "A defendant, against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer, upon affidavit, that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person, and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order."

The summary remedy above provided does not extend to cases where no action has been commenced. In this respect it falls short of the remedy by bill of interpleader. It is settled that when a complainant is *in danger* of being doubly vexed, as when one of the adverse claimants of the fund or property in hand has commenced a suit, and the other *threatens* to do so, he may file his bill and ask the protection of a court of equity. Nor does it seem to be necessary that both parties should appear to have a legal demand for the same debt or duty, adverse to each other; for if the demand of one is of such a nature as to be sueable at law, and the claim of the other grows out of equitable considerations, and is cognizable only in equity, still it may be proper to file a bill; at the same time bringing the money into court, and bringing the parties before the court, in order that their conflicting claims may be adjusted.[2] A complainant, too, against whom *no action has been brought* by either claimant, but who is merely *threatened* by parties having conflicting rights, may maintain a bill of interpleader.[3] Although it usually happens that a bill of interpleader is not filed until one or other of the several claimants has commenced an action against the plaintiff, yet it is well settled that it is enough that a claim is made against him and that he is in danger of being harassed by conflicting suits.[4] A *claim* alone is a ground of interpleader. So a bill of interpleader lies where no *action* is *thratened* or *brought*, but where a proceeding has been instituted which may subject the party

[1] Code of Procedure, § 122. Code of 1851.

[2] Yates v. Tisdale, 3 Edw. Ch. R. 74.

[3] Martinus v. Helmuth, 2 Ves. & B. 412. Gibson v. Goldthwaite, 7 Ala. R. 281. Beck v. Stephani, 9 How. Pr. R. 193.

[4] Richards v. Salter, 6 J. Ch. R. 445. Morgan v. Marsack, 2 Meriv. 107. Angell v. Hadden, 15 Ves. 244. S. C. 16 id. 202. Langston v. Roylston, 2 Ves. jr. 107. Atkinson v. Manks, 1 Cowen, 691, and cases under preceding note.

to a double payment for the same debt or duty. On this principle it has been held, that a person taxed in two different towns or counties, for the same property, when he is only liable to be taxed once, and when it is doubtful to which town or county the right to tax belongs, may file a bill of interpleader, to compel the collectors of the tax to settle the right between themselves.[1]

The foregoing remarks will suffice to show that there are many cases where relief by bill of interpleader, or by bill in the nature of interpleader, was formerly granted, that are not embraced within the provisions of the code of procedure. And it is believed, though the question has not yet been decided, that in cases where summary relief may be granted under the code, the plaintiff may still have his election to proceed by action. The principles which before governed the courts in administering this remedy, will be found important to be understood, and will furnish a safe guide.

It is no objection to an interpleader, as before said, that one of the claims is of an equitable, and the other of a legal nature. The jurisdiction attaches, as well in such case as when both are legal or both equitable.[2]

To sustain a bill of interpleader, strictly so called, the complainant must be indifferent between the respective complainants, and stand in relation to them as a stakeholder. He must not have lent himself in any way to further the claim of either party to the fund in controversy, or to aid one in obtaining the possession thereof to the exclusion of the other.[3] The plaintiff cannot sustain the bill if he has colluded with either party; and indeed, the practice of the court requires that an affidavit, denying all collusion, should be annexed to the bill, and without which it is demurrable.[4] If it be a case of money due by the plaintiff, he should bring it into court, and if of other property, he should offer to do with it what the law requires.[5]

As the proper case for a bill of interpleader is, where two or more persons claim from a third party the *same debt* or the *same duty*, the bill cannot be sustained between landlord and tenant, principal and agent, or attorney and client. Those parties stand in a fiduciary relation to each other. The tenant has nothing to do with any claim adverse to his land

[1] Thompson v. Ebbetts, 1 Hopk. 272. The Mohawk and H. Railroad v. Clute et al. 4 Paige, 384.

[2] Richards v. Salter, 6 J. Ch. R. 445. Yates v. Tisdale, 3 Edw. Ch. R. 71, and note.

[3] Marvin v. Ellwood, 11 Paige, 374.

[4] 1 Mad. Ch. Pr. 144. Mitf. Tr. 126. Shaw v. Corter, 8 Paige, 339. Atkinson v. Manks, 1 Cowen, 704.

[5] Id.

lord. When attacked, he throws himself upon his landlord, who is put in his place. If his landlord does not recover for him, he recovers upon the covenants in his lease an ample recompense.[1] With respect to principal and agent, there is invariably a contract express or implied existing between them. The agent is always liable to account to his principal. Should he refuse to account to his principal on the ground that a stranger made claims against him for the same matter, it is obvious that a bill of interpleader, filed by the agent against his principal and such stranger, could not determine the rights between the principal and agent. Lord Cottenham remarks, in one case,[2] that it is familiarly said, that there is no interpleader between landlord and tenant, or principal and agent; but it will be found that the reason for this lies deeper than might be inferred from the statement of this rule; and that it is to be considered not so much as an independent rule, as a necessary consequence of the principle of interpleading. In both these cases rights and liabilities exist between the parties, independent of the title to the property, or to the debt or duty in question, and which may not depend upon the decision of the question of title.

The same principal applies, between attorney and client. The relation between them creates a duty different from that which exists between the attorney and a stranger. The one is that of confidence and trust; the other, merely the duty which one citizen owes to another. A voluntary payment to his client, of money collected by an attorney, in that character, is always a protection to him. To permit an attorney to maintain a bill of interpleader against his own client and a stranger, in reference to funds collected by him, as such attorney, in order to transfer the fruits of the suit to another party, would be contrary to sound morals. It would be to offer a premium to professional infidelity.[3]

A bailee, agent, or attorney, cannot dispute the *original* title of the person from whom he received the property. Nor can he maintain a strict bill of interpleader to settle conflicting claims of bailor, or principal, and a stranger, who claims the property by a distinct and independent title.[4] Whether, under any circumstances, an attorney can sustain a bill of interpleader against his client and a stranger, when the client is wholly irresponsible, and when he refuses an indemnity against a claim apparently well founded, has been doubted.[5] To sustain such a bill, the

[1] Dungey v. Angoor, 2 Ves. jr. 310. Marvin v. Ellwood, 11 Paige, 370.

[2] Crawshaw v. Thornton, 2 Myl. & Craig, 20.

[3] Marvin v. Ellwood, 11 Paige, 371.

[4] Id. 365.

[5] Id.

complainant at least must show that he has good reason to believe the adverse claim is well founded, and that there is no possibility of protecting himself from loss by any other means than by the interference of the court.[1] But he cannot sustain the bill, to settle the claim to money which he has collected from his client, when a mere stranger claims the money, upon the ground that the security upon which the money was collected was originally obtained by the client wrongfully.[2]

It seems, however, that a bill of interpleader may be sustained by an attorney against defendants who set up a *derivative* claim to money collected for his client, and that his lien on the same for his costs is no objection to the action.[3] In such case, there is no privity between the attorney and the claimants, and no duty is owing by the former to the latter, but what is common to both. In short, he stands indifferent between them, with respect to the matter in controversy.

In a strict bill of interpleader the same thing, debt or duty, must be claimed by both, or all the claimants, if there be more than two. Suppose the vendee of goods should be sued by the vendor for the price, and by a third person claiming a right paramount to that of the vendor. Here it is obvious that a bill of interpleader will not lie, because one of the claimants merely seeks to enforce a contract, and the other claims the value as for an unlawful conversion.[4] And such a case has been held in England not to be within the interpleader act.[5] On the same principle, where a party, having purchased a rick of hay from an executor *de son tort*, was threatened with a suit from the rightful administrator of the same estate, and payment demanded, he was held not to be entitled to maintain a bill of interpleader, or to have relief under the interpleader act. As actual purchaser he was liable on his express contract, unless he could defend the action. To the rightful administrator he was liable only in tort for the conversion. Though the property claimed was the same, the duty, or obligation, was different.[6]

A party who is under an independent liability to one of the claimants, cannot maintain an interpleader. In such a case he does not stand indifferent between the claimants. It is on this principle, as already shown, a bill of interpleader does not lie between landlord and tenant, principal and agent, and attorney and client. But a tenant, not disputing

[1] Marvin v. Ellwood, 11 Paige, 365.
[2] Id.
[3] Gibson v. Goldthwaite, 7 Ala. R. 281.
[4] Slaney v. Sidney, 14 Mess. & Welsb. 800.
[5] Slaney v. Sidney, 14 Mess. & Welsb. 216. Glyn v. Duesbury, 11 Sim. 139.
[6] James v. Pritchard, 7 Mess. & Welsb. 890.

the title of his landlord, but affirming that title, the tenure and the contract, by which the rent is payable, may file a bill of interpleader, when it is uncertain to whom the rent is to be paid.[1] Though the tenant, on notice of an ejectment by a stranger under a title adverse to that of the landlord, cannot file a bill of interpleader against his landlord,[2] yet this rule does not hold where the question arises upon the act of the landlord *subsequent* to the lease.[3] The landlord has no right to complain in such a case, because the necessity for the interposition of equity is occasioned by his own act, and is in no sense an act of hostility by the tenant to the title under which he holds.

If the plaintiff claims a beneficial interest in the subject in controversy he cannot maintain a bill of interpleader.[4] In an action brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the auction duty.[5] With respect to the commission and duty, the plaintiff is not indifferent. He claims that amount as his own, and proposes only to bring into court the balance. If the defendants claim the whole sum without such deduction, and threaten to prosecute for the same, the offer of the plaintiff to bring into court the balance, after deducting the commissions and auction duty, is not as broad as the claim, and thus leaves a part an open subject of controversy between the complainant and the defendants. This is incompatible with the rights of the plaintiff in a bill of interpleader.

But it is no objection to a bill of interpleader, that the complainant has an interest in respect of other property not in the suit, but which might be litigated, that one party rather than the other should succeed in the interpleader, so as to increase his own chance of success, in respect of such other property. Such interest may be termed an interest in the question, but not in the particular suit, and does not prevent him from filing an interpleader. If, however, the complainant be liable to either party in respect of the *specific fund in dispute, beyond the question of property*, or makes claim on the fund, which either of the defendants contests, it is not a proper case for an interpleader.[6] So the lien of an attorney for his costs of collecting the money is no objection to a bill of interpleader, filed against defendants, who set up a *derivative* claim from the person for whom the attorney undertook the collection.[7]

[1] Dungey v. Angove, 2 Ves. jr. 312.

[2] Id.

[3] Cowtan v. Williams, 9 Ves. 107.

[4] Atkinson v. Manks, 1 Cowan, 703. Moore v. Usher, 7 Sim. 384. Mitchell v. Hayne, 2 Sim. & Stu. 63.

[5] Id.

[6] Oppenheim v. Leo Wolf, 3 Sandf. Ch. R. 571.

[7] Gibson v. Goldthwaite, 7 Alabama Rep. 281

Those persons take in subordination to the attorney's lien, and what remains, after deducting the costs, is alone the subject of controversy.

The complainant cannot sustain the bill if he is obliged to admit, that as to either of the defendants, he is a wrongdoer.[1]

He must show that he is ignorant of the rights of the respective parties, who are called upon by him to interplead, and settle their rights between themselves; or at least that there is some doubt, in point of fact, to which claimant the debt or duty belongs. And, therefore, if he states a case in his bill which shows that one defendant is entitled to the debt or duty, and that the other is not, both defendants may demur.[2]

The plaintiff, by filing a bill of interpleader, admits a title as against himself in all the defendants.[3] He cannot, therefore, after filing the bill, set up a right in himself to the fund in controversy.[4]

When the plaintiff has a complete protection at law against the conflicting claims, a bill of interpleader will not lie. Hence, in the city of New-York, the owner of a building cannot interplead the contractor by whom *it was erected*, and the creditors of such contractor, in relation to the balance due from the owner upon the building contract, when the creditors make claim under the act for the better security of mechanics,[5] and such claims are disputed by the contractor.[6] The plaintiff has a complete protection at law, without the necessity of a resort to equity.

The objection in the last mentioned case was not on the ground that there were more than two claimants. There appears to be no difficulty in principle in maintaining, in favor of a stakeholder, a bill against three or more persons, each claiming in a distinct and different right, the same property, as well as against two persons claiming in the same manner.[7]

A bill of interpleader, it has already been shown, lies only where the plaintiff claims no interest in the subject matter. There are, however, many cases, where a bill in the nature of a bill of interpleader will lie by a party in interest to establish his own rights, where there are other conflicting rights between third persons.[8] If, for example, a plaintiff is en-

[1] Shaw v. Coster, 8 Paige, 339. Gwin v. Green, 1 Iredell's Eq. R. 229.

[2] Shaw v. Coster, 8 Paige, 339. Bell v. Hunt, 3 Barb. Ch. R. 391.

[3] Gwin v. Green, 1 Iredell's Eq. R. 229. Anderson v. Wilkinson, 10 Sm. & Marsh. 601.

[4] Id.

[5] Laws of 1830, ch. 330, p. 412.

[6] The Dry Dock Meth. Ep. Church v. Carr, 2 Barb. S. C. R. 60.

[7] Story's Eq. § 814. Adams' Eq. 202 Hoggart v. Cutts, 1 Cr. & Philips, 197. Briggs v. Kouns, 7 Dana, 411. Hays v. Johnson, 4 Ala. R. 267. Atkinson v Manks, 1 Cowen, 703.

[8] Bedell v. Hoffman, 2 Paige, 199.

titled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants in the nature of a bill of interpleader for relief.[1] So it seems a purchaser may file a bill in the nature of a bill of interpleader, against the vendor, or his assignee, and any creditor who seeks to avoid the title of the assignee, and pray the direction of the court as to whom the purchase money shall be paid. So, if a mortgagor wishes to redeem the mortgage estate, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court, to ascertain their rights, and to have a decree for a redemption, so that he may make a secure payment to the party entitled to the money. In these cases the plaintiff seeks relief for himself; whereas, in an interpleading bill, strictly so called, the plaintiff only asks that he may be at liberty to pay the money, or deliver the property to the party to whom it belongs, and may thereafter be protected against the claims of both.[2]

As the plaintiff, in a strict bill of interpleader, claims no relief against either of the defendants, the only decree to which he is entitled is, that the bill is properly filed; that he be at liberty to pay the fund into court, and have his costs, and that the defendants interplead and settle the matter between themselves.[3] If the bill be rightly filed, the plaintiff is of course entitled to his costs out of the fund, and which are eventually to fall upon the party who is in the wrong.[4]

If the bill be not a strict bill of interpleader, but only in the *nature of a bill of interpleader*, costs are not a mere matter of right, but as in other equity cases, rest in the discretion of the court.[5]

The New-York code of procedure has made no provision for costs in actions of interpleader, by name, but the 306th section probably vests the court with the same discretion in such actions, as existed before. And costs should doubtless be granted or withheld, under the like circumstances and in the same manner, as under the former practice.

If the plaintiff's right to file the bill be contested by either of the defendants, the issues must be tried as in other cases. When it appears by the answers of the defendants, or by the proofs, that there is enough be-

[1] Mohawk and H. Railroad Co. v. Clute, 4 Paige, 384.

[2] 2 Eden on Inj. by Waterman, 400, note.

[3] Bedell v. Hoffman, 2 Paige, 200. Mitchell v. Hayne, 2 Sim. & Stu. 63.

[4] Yates v. Tisdale, 3 Edw. Ch. R. 74. Canfield v. Morgan, 1 Hopk. 224.

[5] Bedell v. Hoffman, 2 Paige, 200.

fore the court to decide the whole controversy between all the parties, without directing the defendants to interplead each other, it is usual to grant a decree accordingly.[1] This seems also to be the English practice. Questions arising in such actions, said Sir William Grant,[2] are disposed of in various ways, according to the nature of them. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill by an executor or trustee to obtain the direction of the court upon the adverse claims of the different defendants. If, therefore, at the hearing, the question between the defendants is ripe for a decision, the court decides it; and if it is not ripe for decision, directs an action, or an issue, or a reference to a master, as may best suit the nature of the case. In the Duke of Bolton v. Williams,[3] the question was ripe for decision; and was decided in favor of one defendant against the other; and that decree was affirmed upon the rehearing. Lord Kenyon made a similar decree at the rolls, in Hodges v. Smith, (1 Coxe's Eq. 357.) The bill in that cause was filed by a tenant, for the purpose of ascertaining to which of two different claimants he was to pay his rent: one of the defendants established his title by evidence; the other made default at the hearing. Lord Kenyon directed the rent for the future to be paid to the one; and granted a perpetual injunction against the other. That could not be such a decree as is ordinarily made at the prayer of the plaintiff, when the defendant makes default, for the plaintiff in an interpleading bill does not pray any decree in favor of one defendant against another. It must, therefore, have been either a decree prayed by one of the defendants, or such as the court thought it right to pronounce between them. In Atkinson v. Manks,[4] already cited, no replication was filed, and a reference was ordered on the answer of the defendants, and the question came up on exceptions to the master's report. In that case, too, the costs of all the parties, plaintiffs and defendants, were deducted from the fund.

The provisions of the code of procedure are broad enough to embrace any ordinary form of decree in bills of interpleader. Thus, it is enacted, that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, *and it may determine the ultimate rights of the parties on each side, as between themselves.*[5] This provision is obviously inapplicable to actions at law

[1] City Bank v. Bangs, 2 Paige, 570. Yates v. Tisdale, 3 Edw. Ch. R. 71. Sperry v. S. Carolina Ins. Co. 8 Wheat. 268. Gibson v. Goldthwaite, 7 Ala. 281.

[2] Angell v. Hadden, 16 Ves. 203.

[3] 2 Ves. jr. 138.

[4] 1 Cowen, 693.

[5] Code of Procedure, § 274

and is the appropriate termination of a bill of interpleader in many cases, and occasionally of other actions in equity.

The transactions of individuals are sometimes of such a character that the remedial agency of a bill of interpleader, or a bill in the nature of an interpleader, becomes indispensable. But, though this be so, the courts do not look with favor upon them in general, and express an unwillingness to countenance new inventions, in bringing such actions [1]

SECTION II.

OF BILLS OF PEACE.

A BILL of peace, to prevent litigation at law, is allowed only in case the plaintiff has satisfactorily established his title at law, or when the persons who controvert the right are so numerous as to render an issue under the direction of the court necessary to bring in all the parties concerned, and prevent a multiplicity of suits.[2] The court does not generally interfere, by means of this remedy, between two individuals, until the right has been established at law.[3] But where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions at law quiet that right, he may come into equity *first* by bill of peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendant.

There appears, therefore, to be two classes of cases in which a court of equity entertains jurisdiction by bill of peace, to quiet the rights of parties, and to put an end to further litigation upon the same subject: First, when the plaintiff has been in the actual possession for some considerable time, and his rights are contested by numerous parties, either in the same, or upon distinct rights; and second, when the plaintiff, after repeated trials at law, has established his right at law, and is nevertheless in danger of further litigation by parties who controvert that right.

[1] Metcalf v. Harvey, 1 Ves. 249. Bedell v. Hoffman, 2 Paige, 201. 1 Mad. Ch. Pr. 148.

[2] Eldridge v. Hill, 2 J. Ch. R. 281.

[3] Tenham v. Herbert, 2 Atk. 483.

A few examples under each head will be sufficient to illustrate the jurisdiction exercised by courts of equity in such cases.

Thus, it has been held that a man, who had been in possession of a water-course sixty years, might bring a bill to be quieted in his possession, although he had not established his right at law.[1] So, also, when there has been a possession of a fishery, for a considerable length of time, a person who claims a sole right to it may bring a bill to be quieted in the possession, though he has not established his right at law; and it is no objection to such bill that the defendants have distinct rights.[2] As where a right of fishing upon the river *Ouse*, for nine miles in extent, was claimed by the corporation of York, who had constantly exercised that right, but which was opposed by different lords of manors, a bill of this description was admitted to establish the right against these several opponents, for it would have been endless for the corporation to have brought actions at law.[3] In another case, where the plaintiff brought his bill in order to establish his right to an oyster fishery, and to be quieted in the possession of it, against the defendant, who claimed the piece of ground where the fishery was, as belonging to his manor, a demurrer was allowed, because when the question about a right of fishery is *only* between two lords of manors, neither of them can come into a court of equity till the right is first tried at law. And Lord Hardwicke said, it is certain that where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions at law quiet that right, he may come into a court of equity first, which is called a Bill of Peace, and the court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since each action would determine only the particular right in question between the plaintiff and defendants.[4]

Such a bill may be brought as well by tenants against a lord, as by a lord against tenants.[5]

Such a bill was entertained at the instance of the New River Company, to quiet them in the possession of pipes laid through the defendant's field.[6] It was sustained where several tenants claimed the right

[1] Bush v. Western, cited in Mayor of York v. Pilkington, 1 Atk. 284.

[2] Mayor of York v. Pilkington, id. 282.

[3] Id. Tenham v. Herbert, 2 Atk. 483. Id. How v. Bromsgrove, 1 Vern. 22.

[5] Conyers v. Lord Abergavinny, 1 Atk. 285.

[6] New River Co. v. Graves, 2 Vern. 431.

to the profits of a fair.[1] And it has been sustained in numerous analogous cases.[2]

The distinction between the two classes of cases in which this species of relief is granted, has been recognized by the court of errors in New-York.[3] The object of the equity power, in such cases, says Kent, Ch. J, in his learned opinion, is as beningn as it is rational; and Van Ness, J., in the same case said, courts of law, in some cases, have not the power of putting an end to vexatious and oppressive litigation. Actions of ejectment, and in some cases actions of trespass, may be repeated again and again, until the sinews of litigation are exhausted, and until the resources, but not the spirit, of the parties fail. This is, perhaps, a defect in the common law system; which is supplied, in certain cases, by the enlarged and superintending powers of a court of chancery.

In one case, in the supreme court of the United States, Marshall, Ch. Justice, said, that an application to restrain a person from the assertion of title in the ordinary course of judicial proceedings ought not to be granted in a doubtful case; but if the case is a clear one, the interposition of equity is allowable; and the situation of the land adjoining a growing city, the number of persons who are consequently interested in the settlement of the question, and the numerous titles which depend on it, give it peculiar claim to the attention of the court.[4] And Chancellor Sanford said, in one case, that where the right of the plaintiff is an absolute and clear title, requiring no trial at law to establish it, and supported by a long possession, if it be disputed by the defendants, the violation of it will be restrained by injunction. In that case, too, the parties were numerous.[5]

The right claimed must affect many persons, to warrant the court to interfere in this way; for if the controversy be between two persons only, on their own account, and not as representing large numbers, it is said the bill will be dismissed. On this principle, Lord Chancellor King decided that a bill could not be brought, by a single copy-holder, to be relieved against an excessive fine. He admitted, in the same case, that a bill might lie in order to settle a general fine to be paid by all the copy-hold tenants of a manor, to prevent multiplicity of suits.[6] So when a bill

[1] New Elme Hospital v. Andover, 1 Vern. 266.

[2] Trustees of Huntington v. Nicoll, 3 J. R. 566, 589, 602, 604.

[3] Eden on Injunc. by Waterman, 418 et seq. and notes.

[4] Alexander v. Pendleton, 8 Cranch, 220.

[5] Reid v. Gifford. 1 Hopk. 418.

[6] Cowper v. Clerk, 3 P. Wms. 157 Disney v. Robertson, Bunb. 41.

was brought by *one* tenant of a manor, suggesting a custom for the tenants of a manor of A., of which he was one, to cut turves in the manor of B. to quiet him, and to have the issue directed as to the right; upon this occasion, the court said, this bill is improper, and inconsistent with the nature of a bill of peace, which is, that where *several persons* having the same right are disturbed, on application to the court to prevent expense and multiplicity of suits, issues will be directed, and one or two determinations will establish the right of all parties concerned, on the foot of one common interest, and the bill is preferred by all the parties interested, or a determinate number in the name of themselves and the rest; but in this case one only brings the bill on the general right, and not on the foot of any particular distinct right, and therefore the bill was dismissed.[1]

The other class of cases, under the head of Bills of Peace, comprises cases where the plaintiff, after repeated trials at law, has established his right at law, and is nevertheless in danger of further litigation, by parties who claim that right. Lord Redesdale thus describes this jurisdiction: "In many cases the courts of ordinary jurisdiction admit, at least for a certain time, of repeated attempts to litigate the same question. To put an end to the oppression occasioned by the abuse of this privilege, the courts of equity have assumed jurisdiction. Thus, actions of ejectment having become the usual mode of trying titles at the common law, and judgments in those actions not being in any degree conclusive, the courts of equity have interposed; and after repeated trials, and satisfactory determination of questions, have granted perpetual injunctions to restrain further litigation; and thus have in some degree put that restraint upon litigation, which is the policy of the common law in the case of real actions."[2] This jurisdiction was, at an early day, questioned. In a celebrated case,[3] the title was a mere legal one, and the complainant, after five trials in ejectment, and verdicts in each case for him, brought a bill of peace for a perpetual injunction. Lord Cowper refused to grant the relief, on the ground that it was only a controversy between two individuals, and not a proper case for a Bill of Peace. But the decree of the chancellor was reversed by the house of lords, and a perpetual injunction granted. The principle thus established has ever since been followed, that when the right has been established by several trials,

[1] Harrison's Ch., vol. 1, p. 124. 1 Mad. Ch. Pr. 140.

[2] Mitford's Eq. Pl. by Jeremy, 143, 144.

[3] Earl of Bath v. Sherwin, Prec. Ch 261.

equity will quiet the title by Bill of Peace, and put an end to further litigation. In a later case,[1] a trust estate having been devised by will and the will was disputed, the court, after two trials in favor of the will, granted a perpetual injunction. The chancellor said, it is certainly an inconvenience in the law that there should be no end of trials in ejectment, and that one trial in a real action, which perhaps may be a trial at *nisi prius*, should be final, when, at the same time, twenty trials in ejectment and at the bar in Westminster Hall will not be conclusive.[2]

The reasons above given for a Bill of Peace, after two or more recoveries in an ejectment, do not exist in New-York, since the adoption of the revised statutes of 1830. The abolition of fictitious parties to the action, and the making of the judgment rendered upon the verdict conclusive, as to the title established, in such action, upon the party against whom it was rendered, and against all claiming under him, and the provision for two new trials, upon the application of the failing party, granted within a limited time after the first verdict, and upon payment of costs, were designed to prevent the endless litigation which, but for a court of equity, might be carried on by actions of ejectment.[3]

There is, however, some scope for the bill in matters of a personal nature. There are some cases where it partakes of the nature of a bill for specific performance, and some where it resembles the remedy by bill *quia timet*. Thus the surety may have relief in equity against the principal, after the debt becomes due, and before it has been paid by the former, and the latter be decreed to save the surety harmless.[4]

The code contains no provision which renders the remedy by Bill of Peace impracticable. It allows all persons having an interest in the subject of the action, and in obtaining the relief demanded, to be joined as plaintiffs; and any person who claims an interest adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions, to be defendant.[5] And the plaintiff is allowed to join in the same complaint several causes of action, whether legal or equitable, or both, when they all arise out of the same transaction, or transactions connected with the same subject of action.[6] When the grievance is common to all, and they all claim the same relief, the objection of multifariousness cannot be entertained.[7]

[1] Leighton v. Leighton, 1 P. Wms. 671.

[2] Trustees of Huntington v. Nicoll, 3 J. R. 566, 589–595, 601, 602. Reid v. Gifford, 1 Hopk. 418–420.

[3] 2 R. S. 304, § 6, p. 309, §§ 36, 37, and notes of the revisers. 3 R. S. 2d ed. 709.

[4] Hays v. Ward, 4 J. Ch. R. 132. Champion v. Brown, 6 id. 406.

[5] Code, §§ 117, 118.

[6] Id. § 167.

[7] Reid v. Gifford, 1 Hopk. 419. Conro v. Port Henry Iron Co. 12 Barb. 27, 59.

SECTION III.

BILLS QUIA TIMET.

A BILL Quia Timet is a preventive remedy, and may be filed by a party apprehending a future inconvenience, which may probably happen, or be occasioned by the neglect or culpable act of another. It has already been alluded to under other heads, and will be mentioned again when we come to treat of injunctions.

The name of the bill was probably borrowed from the title of some ancient writs at the common law. Lord Coke says, "there be six writs in law that may be maintained, *quia timet*, before any molestation, distress or impleading; as 1. A man may have his writ of *mesne* (whereof Littleton here speaks) before he be distrained. 2. A *warrantia chartæ*, before he be impleaded. 3. A *monstraverunt*, before any distress or vexation. 4. An *audita querela*, before any execution sued. 5. A *curia claudenda*, before any default of enclosure. 6. A *ne injuste vexes*, before any distress or molestation. And these he called *brevia anticipantia*, writs of prevention."[1] These remedies have all been so long antiquated, that but few traces remain of their former existence. In modern times, courts of equity have administered relief in the foregoing, and many other cases, and arrested the commission of anticipated injuries, by the bill *quia timet*. The foundation of the jurisdiction is the probability of irreparable mischief, the inadequacy of a pecuniary compensation, and the prevention of a multiplicity of suits.[2]

The application of this remedy to rights of an equitable nature, may be illustrated by the interference of the court in favor of a legatee, whose legacy is payable at a future day, and compelling the executor to bring the money into court, or to give security.[3] In an early case, where the legacy was not payable until ten years after the death of the testator, and though no particular reasons were assigned, as wasting assets, or insolvency of the defendant, yet the executor was decreed to give security, by Sir Thomas Clarke, master of the rolls, on the general rule of the court.[4]

To render an application to equity unnecessary, and to afford in all

[1] Co. Litt. 100, a.

[2] 1 Fonb. Eq. B. 1, ch. 1, § 2, note.

[3] Lupton v. Lupton, 2 J. Ch. R. 627. 1 Mad. Ch. Pr. 179.

[4] Ferrard v. Prentice, Ambl. 273.

cases adequate security for the faithful administration of the estates of testators, executors are required in many of the states to give bonds like administrators; and the revised statutes have made provision for requiring such bonds to be given, through the intervention of the surrogate, in all cases, on the application of a party interested in the estate, when the executor has become incompetent by law to serve as such, or his circumstances are so precarious as not to afford adequate security for his due administration of the estate, or he has removed, or is about to remove from the state.[1]

The power thus granted to surrogates does not supersede the jurisdiction of a court of equity to interpose its authority to protect the assets from the improvidence of the executor and from the danger of loss, resulting from his poverty, incapacity, or any other cause; where not only the right of enjoyment is future or contingent, but in other cases. On one occasion, Chancellor Kent said, it is the settled principle of the court that an executor or other trustee, who mismanages or puts the assets in jeopardy by his insolvency, either existing or impending, should be prevented from further interfering with the estate, and that the funds should be withdrawn from his hands.[2] And in the same case, where one of three executors obtained possession of a bond and note belonging to the estate, from the custody of his associates, without their assent, and with an unequivocal disposition to convert them to his own use, the court directed him to restore the bond and note to his co-executors, and restrained him from acting or intermeddling any further with the assets, or in the administration thereof as co-executor.

The cases of most frequent occurrence, are where the property or rights to be secured are of an equitable nature with a present right of enjoyment, or where the right of enjoyment is contingent or future. The jurisdiction attaches in either case. A few more examples will suffice for illustration. Thus, where the testator gave a legacy to his child, an infant, payable at his age of twenty-three years, and made his wife executrix and residuary legatee; she married again and died, whereupon her husband took out letters *de bonis non*, with the will annexed; upon a bill suggesting insolvency, the second husband was ordered to give security to pay the legacy when due.[3] So where a testator by will gave out of his personal estate several legacies, and among others an annuity of twenty pounds a year to J. S. for life, on the executors threatening to defeat

[1] 2 R. S. 72, § 18, &c. Mandeville v. Mandeville, 8 Paige, 475. Wood v. Wood, 4 id. 299.

[2] Elmendorff v. Lansing, 4 J. Ch. R. 565.

[3] Rouse v. Noble, 2 Vern. 249. Slanning v. Style, 3 P. Wms. 336.

the annuity, the court, on a bill by the annuitant, ordered a sufficient part of the personal estate set apart and assigned to a trustee in trust to secure the annuity.[1] So where a legacy was left to one, *to be paid* at twenty-four, the plaintiff being only twelve years old, the father filed a bill to invest the legacy in the funds, and so it was decreed, though it was at the same time declared that the plaintiff was not entitled to the money.[2]

If personal chattels are bequeathed to A. for life, remainder to B., the former will be entitled to the possession of the goods upon signing and delivering to the executor an inventory of them, admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder.[3] The old practice of the court of chancery, was to require the tenant for life to give security for the protection of the remainderman; but such security is not now required, except a case of danger is shown.[4]

Where there is a charge upon a personal estate, though it is not immediately payable, yet the person entitled may come into equity, and pray that a sufficient sum may be set apart to answer the legacy when it shall become due.[5] The rule is otherwise when the legacy is to be raised out of real estate.[6]

So in Johnson v. Mills,[7] the sum of two thousand pounds was left to the testator's daughter at twenty-one; and in default, to her child; and if no child, to one Mills; a bill was filed to secure the fund; which was opposed by the executrix, on the ground that there was no danger or insolvency in the case; but Lord Hardwicke, said, "I thought nothing was better settled than what is now endeavored to be made a question; that whenever a demand was made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the mean time, that he might not be obliged to pursue these assets through several hands. Nor is there any more useful part of the jurisdiction of this court in the administration of assets; therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so that it might fall into the bulk of the estate; and this is done to secure

[1] Batten v. Earnley, 2 P. Wms. 163.

[2] 1 Mad. Ch. Pr. 179.

[3] Slanning v. Style, 3 P. Wms. 336. Leeke v. Bennett, 1 Atk. 471. Bill v. Kinaston, 2 id. 82. Covenhoven v. Shuler, 2 Paige, 123. De Peyster v. Clendining, 8 id. 295.

[4] Bill v. Kinaston, 2 Atk. 82.

[5] Phipps v. Annesley, 2 Atk. 58.

[6] Gawler v. Standerwicke, 2 Cox, 15.

[7] 1 Ves. sen., 282.

the interest of every party, of course, as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets."

Again, in another case,[1] a legacy was given to a female infant, to be paid at twenty-one or marriage, with interest at four per cent; but if she died before, it was directed by the will that the legacy should sink into the residue; and Lord Thurlow ordered the sum of five thousand pounds, with interest at four per cent, from the end of the year after the testator's death, forthwith to be laid out in the three per cents, in the name of the accountant general, upon the trusts and subject to the contingencies in the testator's will; and his lordship said that he did not see any distinction as to the legacy being contingent or merely future.

So, where A. was entitled to the use of goods and a library for life, with remainder to the plaintiff's wife, who died, the plaintiff, as his administrator, brought a bill of this description to have the goods, &c., secured to him after the death of A., and a decree was made accordingly.[2]

So, also, Lord Keeper North thought, that if A. is bound for B. and has a counter bond from B., and the money is become payable on the original bond, equity will compel B. to pay the debt, *although A. is not troubled or molested for the debt*, since it is unreasonable that a man should always have such a cloud hanging over him.[3] This doctrine has been approved in this state; and it was applied by Chancellor Kent to the ordinary cases of principal and surety.[4]

It is now the settled rule, that a surety, apprehending danger from the delay of the creditor, may resort to a court of equity, and compel the creditor to sue the principal debtor, though probably he must indemnify the creditor against the consequences of risk, delay and expense.[5] It is the right of a surety to call upon a creditor having another fund, which the surety cannot make available, and to require him to resort to that fund in the first instance and exhaust it.[6] Lord Eldon in one case said: We have gone this length, that if a creditor has a right to go upon two funds, and another creditor of the same debtor upon one, the first shall take payment from that fund to which he can resort exclusively; that by these means of distribution, both may be paid.[7] The foregoing cases be-

[1] Green v. Pigot, 1 Bro. C. C. 103.
[2] Bracken v. Bentley, 1 Ch. R. 110; S. C., 1 Eq. Cas. Abr. 78, pl. 1.
[3] Ranelaugh v. Hayes, 1 Vern. 190.
[4] Hayes v. Ward, 4 J. Ch. R. 132. Champion v. Brown, 6 id. 406.
[5] Id. King v. Baldwin, 2 id. 562.
[6] Id.
[7] Kendall ex parte, 17 Ves. 520.

long to other heads of equity jurisdiction, as well as the one we are now considering.

There is a distinction between a bequest of specific chattels, and the bequest of a general residue. We have already stated the rule in the former case. In the latter case the rule is, that where there is a general bequest of a residue for life, with remainder over, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is paid to the legatee for life.[1] Though the legacy be of articles which must necessarily be consumed in the using, as of hay, grain, &c., or be of articles capable of a separate use for life, or of both together, the rule is the same, and the first legatee is not entitled to the use of the fund, in the mean time, without giving ample security for the return of the principal at the termination of the particular estate therein. In general, however, the executor, which is, perhaps, the preferable course, retains the fund, and pays over the income as it accrues to the first legatee.[2]

In all cases where property is held by one party in trust for others, and there is danger of its being squandered or diverted to the prejudice of any one having a present or future, a vested or contingent interest in it, the court, on a bill for that purpose, will appoint a receiver, and direct the property to be vested in him for the benefit of all concerned. "This power," said Lord Hardwicke, on one occasion,[3] "is a discretionary power exercised by a court of equity with as great utility to the parties as any sort of authority that belongs to the court, and is provisional only for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled, and does not at all affect the right." At common law, and independently of statute regulations, a receiver is treated as an officer of the court, subject to its orders, and entitled to its protection. This appointment is not for the benefit of any particular party, but of all who are or may become interested in the fund.[4] The money in his hands is in the custody of the law for whoever can make out a title to it. The order for the appointment of a receiver, followed up by giving the requisite security in equity, vested the property in the receiver, without any assignment from its former owner.[5] At law, an ordinary receiver was not considered as having the legal title, so as to

[1] Covenhoven v. Shuler, 2 Paige, 122. Clark v. Clark, 8 id. 160.

[2] Id.

[3] Skip v. Harwood, 3 Atk. 564.

[4] Green v. Bostwick, 1 Sand. Ch. R. 185.

[5] Mann v. Pentz, 2 Sand. Ch. R. 257 Wilson v. Allen, 6 Barb. 542.

authorize him to institute a suit in his own name, for any debt or demand transferred to him, or to the possession or control of which he was entitled under the order of the court.[1] He had the mere custody or charge of the property, under the direction of the court, and could use the name of the person of whose estate he was receiver, in prosecuting actions to reduce the property to possession.

The frequent necessity of resorting to the appointment of receivers, in winding up the estates of insolvent debtors, sued by creditors' bills, and in a great variety of other cases, led in New-York to legislative provisions, essentially altering the common law in this respect. Thus, by the act entitled "An act in relation to the powers of receivers and committees of lunatics and habitual drunkards,"[2] a receiver, appointed by virtue of an order or decree of the court of chancery, was empowered to take and hold real estate upon such trusts and for such purposes as the court might direct, subject to its further order or direction, from time to time, in relation to its disposition. And the second section authorized receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the court of chancery, to sue, in their own names, for any debt, claim or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee; and when ordered or authorized to sell such demands, the purchaser thereof was authorized by the same section to sue and recover therefor, in his own name, he giving such security for costs to the defendant as the court in which such suit is brought might direct. The chancellor, in Wilson v. Wilson, already cited, did not consider this act broad enough to transfer the title of real estate to the receiver, by the mere order of the court, and without an actual conveyance from the party to the suit in which such legal title is vested. And hence it was usual to direct an assignment of his real estate by the debtor to the receiver. The New-York code of procedure, adopted in 1848, and successively afterwards amended, in several respects, seems to have placed real property and personal property, with reference to this question, on the same footing.[3] If one passes, by force of the order of the court, and becomes vested in the receiver, without an as-

[1] Wilson v. Allen, 6 Barb. 545. Wilson v. Wilson, 1 Barb. Ch. Rep. 594. Chautauque County Bank v. White, 6 Barb. 589; S. C. in court of appeals, 4 Seld. Verplank v. The Mercantile Ins. Co. 2 Paige, 452.

The doctrine of the supreme court in the third district, that an assignment by the debtor of his real property to the receiver, would not pass the title to the latter, (see Cubatauque Co. Bank v. White, 6 Barb. 589,) was expressly overthrown by the court of appeals in the same case on appeal. See 4 Seld.

[2] L. of 1845, p. 90, ch. 112.

[3] Code of Procedure of 1851: compare §§ 462, 463, 464.

signment by the debtor, as it has been shown that personal property does, the other, since the adoption of the code, follows the same rule.[1] But whether this be so or not, it is well settled that the title to real property will pass by an assignment by the debtor to the receiver, made in pursuance of an order of the court.[2]

The appointment of a receiver does not operate in such a manner as to derange the priority of legal or equitable liens upon the property. As the object of the appointment of a receiver is to preserve the property for the person or persons entitled to it, the court will ultimately make such disposition of it as to preserve the legal as well as equitable rights of every claimant. Before the statute of 1845, the appointment of a receiver, in a creditor's suit, was treated as an equitable sequestration of the property of the defendant.[3] And even if the tenant of real estate was not a party to the bill, he could be made to attorn to the receiver, and pay the rents and profits to him.[4] Much more could he be so required, when he was made a party.

If a receiver takes possession of property under the *express* direction of the court, though there be conflicting claims to the property, the court will not permit its officer to be harassed by a suit for obeying its order.[5] It will enjoin any suit brought against the receiver, and administer justice to the parties according to its own notions of equity.

But if the receiver, without any *direction* to that effect from the court, forcibly take goods belonging to others exclusively, under pretense that they are goods belonging to the party for whom he was appointed receiver, the court may, in its discretion, either take to itself the cognizance of the complaint, and do justice between its officers and the parties aggrieved, or it may permit the latter to bring a suit at law for the alleged injury.[6] This is upon the principle that the possession of the receiver, when rightful, is the possession of the court; and no one can disturb it but through an application to the court. The acts of the receiver, in the administration of the estate, are the acts of the court; and the court may, therefore, if it pleases, prevent any other jurisdiction from questioning those acts, because, strictly speaking, that would be to question the court's adminis-

[1] See opinion in court of appeals, Porter v. Williams, decided Dec. T. 1853; S. C., 5 Howard's Pr. R. 441. Chautauque Co. Bank v. White, in court of appeals, reversing S. C., 6 Barb. 589.

[2] Id.

[3] Albany City Bank v. Schermerhorn, 9 Paige, 372, 377.

[4] Id. Sea Ins. Co. v. Stebbins, 8 Paige, 565.

[5] Parker v. Browning, 8 Paige, 389.

[6] Id. 390. Aston v. Heron, 2 Myl. & Keene, 390.

trative proceedings. But the court may leave the acts of the receiver to be questioned elsewhere, for the purpose of trying the right.[1]

The duties which devolve on a receiver do not, in any case, make it necessary for him to put himself in a situation in which he will not be entitled to the full protection of the court. He is under no obligation to attempt to take property out of the possession of a third person, or even of the defendant, by force, and without an express order of the court directing him to do so.[2]

In New-York the practice was well settled, that where the defendant was directed to deliver over his property to the receiver under the direction of a master, it was customary for the receiver to call upon the master to decide, upon the examination of the defendant, and other evidence, if any before him, what property, legally or equitably belonging to the defendant, and to which the receiver was entitled under the order of the court, was in the possession of the defendant or under his power and control. And it was the duty of the master to direct the defendant to deliver over to the receiver the actual possession of all such property, in such manner, and within such time, as the master might think reasonable. Where such direction was given, the defendant, if he was dissatisfied with the decision of the master, could apply to the court to review the same; and he could, if the same was confirmed, be compelled, by process of contempt, to comply with that decision.

If the property was in the possession of a third person, claiming a right to retain it, the receiver could proceed by suit against such person in the ordinary way, and thus try the right, or the complainant could amend his bill, making such third person a party, and have the receivership extended to the property in his hands; so that the order for the delivery of the property might be binding upon him, and be enforced, if necessary, by process of contempt.[3]

Where the property was legally and properly in the possession of the receiver, it was the duty of the court to protect that possession, not only against acts of violence, but also against suits at law; so that a third person, claiming the same, might be compelled to come in and ask to be examined *pro interesse suo*, if he wished to test the justice of such claim. But where the property was in the possession of a third person, under a claim of title, the court would not protect the officer, who attempted by violence to obtain possession, any further than the law would pro-

[1] Parker v. Browning, 8 Paige, 390. Aston v. Heron, 2 Myl. & K. 390.

[2] Parker v. Browning, 8 Paige, 390.

[3] Parker v. Browning, 8 Paige, 391.

tect him; his right to take possession of property, of which he had been appointed receiver, being unquestioned.[1]

These principles remain the same at this day, though the duties, formerly devolving upon a master, are now discharged by the court, or a referee. The act of 1845, already referred to, has enlarged the powers of the receiver; and the abrogation of the court of chancery by the present constitution, and the vesting of law and equity jurisdiction in the same court, have produced some change in the mode of procedure, not necessary to be discussed in this treatise, and which properly belongs to books of practice.

The appointment of a receiver is, in general, one of the objects of a bill *quia timet*. The cases to which it is applied, and the nature of the relief, show that it belongs to that form of remedy. Where an executor or other trustee is charged with abusing his trust, a receiver may be appointed.[2] A creditor filing a bill against an executor cannot make a debtor of the testator a party. If there is a suspicion that the executor is insolvent, and a proper case in other respects is made out, the court will appoint a receiver, and restrain the executor from intermeddling with the estate.[3] And if it be necessary to bring actions at law to recover part of the effects, it must be in the name of the executor, and the court will compel him to allow his name to be used.[4] Whether the act of 1845,[5] in conjunction with the provisions of the code, will authorize the receiver of an executor to bring actions in his own name to recover debts due to the estate, has not yet been decided. It would seem that a person expressly *authorized to sue in his own name by statute*, may do so, whether the party he represents had a cause of action in his own right or in *auter droit*. But this question belongs rather to practice and pleading, than to jurisdiction.

There are numerous other cases where the relief is granted on the principle of *quia timet*, which have already been considered under other heads, or which will appropriately fall under the head of injunction. Creditors' bills are in part founded upon this principle.

The question whether a receiver merely stands in the shoes of the party whose estate is entrusted to him, or whether he represents the creditors, and other persons interested therein, has been settled in this state in

[1] Parker v. Browning, 8 Paige, 391.
[2] Boyd v. Murray, 3 J Ch. R. 48.
[3] Utterson v. Mairs, 2 Ves. jr. 95, 98.
[4] Id. S. C., 4 Bro. C. C. 277.
[5] L. of 1845, p. 90. Code, §§ 111, 112 113.

favor of the latter position.[1] Hence, it is competent for him, in that character, to maintain an action to set aside a fraudulent assignment, made by the party whose estate he administers. An executor or administrator, under the Revised Statutes, represents other interests than those of his testator or intestate, and can impeach the acts of the former, when the claims of creditors make it necessary.[2] This is contrary to the earlier cases, prior to 1830, which were decided on the principles of the common law.[3]

The foregoing cases and remarks are sufficient to illustrate the general principles which govern in cases of Bills of Interpleader, Bills of Peace, and Bills *Quia Timet*. A more extended discussion would lead to a repetition of much that is more appropriate to the head of injunction.

SECTION IV.

OF BILLS TO MARSHAL SECURITIES.

IN considering the doctrine of apportionment and contribution, we have already had occasion to bring to the notice of the reader, principles analogous to that of the subject of this section. We shall also, in a subsequent chapter, be led to discuss, at some length, the principles on which the assets of deceased persons are marshaled, and which bear a close resemblance to those which prevail in marshaling securities where the parties are still living.[4] The doctrine in cases of this kind, as expounded by Lord Hardwicke, Lord Eldon, Chancellor Kent and others, is, that where there are several creditors, having a common debtor, who has several funds, all of which can be reached by one creditor, and only a part of the funds by the others, the former shall take payment out of the fund to which he can resort exclusively, so that all may be paid.[5]

[1] Porter v. Williams, 5 How. Pr. R. 441; S. C. on appeal, 4 Seld. Wilson v. Allen, 6 Barb. 544, 545.

[2] Dox v. Backenstose, 12 Wend. 542. Babcock v. Booth, 2 Hill, 181. Brownell v. Curtis, 10 Paige, 210, 218. 2 R. S. 87, § 28. Id. 449, § 17.

[3] Osborne v. Moss, 7 J. R. 161.

[4] See post, CHAP. VII, Sec. 14.

[5] Ex parte Kendall, 17 Ves. 520. Dorr v. Shaw, 4 J. Ch. R. 17, 20. Aldrich v. Cooper, 8 Ves. 382. White's Leading Cas. in Eq. vol. 2, part 1, pp. 175, 192 to 237, notes by American editor. Cheesborough v. Millard, 1 J. Ch. R. 413. Lanoy v. The Duke of Athol, 2 Atk. 446. The N. Y. Ferry Co. v. The N. J. Co. Hopk. 460. Evertson v. Booth, 19 J. R.

This principle applies to mortgages, judgments, or any other security which creates a lien in favor of the creditor; and it rests upon the natural equity, that one man shall not so use the right which he enjoys, as to prejudice, unnecessarily, the rights or remedies of others. The law does no injustice to the creditor, whose lien is the most extensive, if it prevents him from wasting or sacrificing the fund. It permits him to be paid in full, but out of such portions of the fund that will work the least inconvenience to the creditors, whose liens are confined to a part of it only. It is obvious that in this way no wrong is done to the creditor who could reach all the funds, and the common debtor receives a benefit by the discharge of a larger portion of his debts, than if the funds were needlessly exhausted by a single creditor.

The relief in these cases is never granted, except where the plaintiff and the party against whom it is prayed, are creditors of a common debtor; and the relief can be granted without prejudice to the latter. The principle is not applicable, where the first creditor has a judgment or other security against two persons, and the second creditor has a like judgment or other lien against one of the same persons, unless it be averred and proved that the latter alone is bound to pay both debts; for, in that case, he becomes the common debtor. This is illustrated by the case of Dorr v. Shaw, already cited. In that case, the defendant held a judgment against A. and B., binding upon seventy-two acres of land owned by A., and thirty acres of land owned by B. The plaintiff was the owner of a younger judgment against A. only, and binding on the seventy-two acres alone. The defendant, as owner of the elder judgment, purchased in the thirty acres, on which his judgment originally attached, in part payment of his judgment, and the plaintiff, as owner of the junior judgment, purchased in the seventy-two acres, bound by his judgment. The defendant then pursued his execution, to collect the balance of the elder judgment, against the seventy-two acres. The plaintiff sought by his bill to prevent this, by requiring the defendant to be satisfied by his sale of the thirty acres, already purchased by him, averring in his bill that the said thirty acres were worth more than enough to pay the defendant's judgment, though bid off by the defendant for a less sum. The chancellor held that relief could not be granted, inasmuch as it did not appear which of the debtors ought to pay the debt. Treating both A. and B. as original debtors, there was no reason

486. Besley v. Lawrence, 11 Paige, 581. Doyle, 1 Paige, 558. Wilder v. Keeler, Hunt v. Townsend, 4 Sand. Ch. R. 510. 3 id. 167.
Averill v. Loucks, 6 Barb. 470. Purdy v.

why the court should interfere, and charge the debt upon one of them instead of the other. They were not parties to the suit.[1] If, in truth, the thirty acres were worth enough to pay the elder judgment, the plaintiff should have attended the sale, and bid the property up to that amount, and thus relieved the seventy-two acres from the lien of that judgment Having ommitted to avail himself of that remedy, he had no equity to compel the elder judgment creditor to forego his legal advantage, arising from the priority of his lien on the seventy-two acres. The latter was entitled to the payment of his judgment in full.

Marshaling securities will not be enforced to the prejudice of a third party. Thus, where a person being seised of several estates, and indebted by judgments, settled one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, it was insisted by the subsequent judgment creditors that as they only affected the unsettled estates, on the principle in Aldrich v. Cooper, they, having only one fund, had a right to compel the prior judgment creditors, who had two funds, the settled and the unsettled estates, to resort to the former; or at any rate, that the settled estates ought to contribute to the payment of the prior judgments. But Sugden, lord chancellor, held, that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates; on the contrary, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute; observing, after a close examination of Aldrich v. Cooper, that, upon the whole of the case, Lord Eldon, in the application of the principle, carefully avoided dealing with the rights of third persons intervening.[2]

Where a creditor buys in an incumbrance at an under value, he is entitled to be allowed the whole amount, unless he be a trustee, agent, &c., or stand in confidential relations to the party, in which latter case, he is allowed for it no more than he actually paid as against his cestui que trust, principal, &c.[3]

Enough has been said to illustrate the general principles on which securities are marshaled by the court. It is truly one of the remedies to prevent fraud. Examples of the doctrine will be found under other heads, which it is unnecessary to repeat.

[1] Dorr v. Shaw, 4 J. Ch. R. 17. Ex parte Kendall, 17 Ves. 520. Hawley v. Mancius, 7 J. Ch. R. 184.

[2] Averall v. Wade, L. & G. t. Sugden 252. White's Eq. Cas. vol. 2, B. 1, p. 192, notes. Barnes v. Racster, 1 Young & Col. C. C. 401.

[3] Monet v. Parke, 2 Atk. 54. Williams v. Springfield, 1 Vern. 476. Philips v. Vaughn, id. 336.

CHAPTER VI.

OF INJUNCTIONS.

SECTION I

GENERAL VIEW OF THE SUBJECT.

AN injunction is a mandate in writing, issued by a court or officer of competent jurisdiction, either under the seal of the court, or by order, commanding the party to whom it is addressed to do, or to refrain from doing, some particular thing, as is required in such writ or order. According to the former practice of the court of chancery of this state, an injunction usually issued under the seal of the court, in pursuance of an order for that purpose, granted by the chancellor, a vice chancellor, or an injunction master. But there were numerous cases in which the court expressed its commands, in the shape merely of an order in the nature of an injunction. And the court treated the negligence or disobedience of its order as a contempt, and enforced the performance of it by imprisonment. The object sought by an injunction was as well attained by the order as by the writ of injunction.[1]

Injunctions, with reference to their *duration*, are of two kinds, *preliminary* and *final*. The first are granted *before*, and the last *after* the final decree or judgment in the cause.[2] With reference to their *objects*, they are of two kinds, commanding a party to do, or to refrain from doing, a particular thing.

The granting of a preliminary injunction rests in the discretion of the court.[3] There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, when it would manifestly be

[1] Eden on Injunc. ch. 14. 2 R. S. 173. Chancery Rules, 30, 31.

[2] 1 Barb. Ch. Pr. 608.

[3] Potter v. Chapman, Ambl. 99. Roberts v. Anderson, 2 J. Ch. R. 202.

improper to grant an injunction *in limine*. The *final* injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the cause.[1] A preliminary injunction should not be granted before answer, unless it is necessary to protect some interest or right, which may be injured or endangered by the defendants' proceedings in the mean time.[2]

An injunction is never granted against persons who are not parties to the suit.[3] And it should only be granted where the rights sought to be protected are clear, or at least free from reasonable doubt.[4] And a preliminary injunction should never be granted unless specifically prayed for in the bill.[5] In this state, the pleading on the part of the plaintiff is called a *complaint* instead of a *bill* under the old pratice. But the complaint, as has been before stated, must contain, like the bill, a statement of the facts which constitute the cause of action, and the appropriate prayer or demand for the relief sought. The rule with respect to the necessity of filing the bill, is probably applicable to the complaint, which is substituted for it.

When the court obtains jurisdiction of the cause by bill or complaint, an injunction should not be issued until the bill is filed.[6] If the injunction be granted pending the action, upon a petition for that purpose, the filing of the petition before granting the injunction is a substantial compliance with the act.[7]

According to the English practice, a distinction is made between *common* and *special* injunctions. An injunction which issues for the default of the defendant, either in appearing or answering, is called a *common* injunction. *Special* injunctions are such as are granted only upon special application to the court. This distinction is inapplicable to our practice, as all injunctions are granted upon special application to the court, or to a judge; and these, with respect to preliminary injunctions, are granted either *ex parte* on filing the bill or petition, or upon notice, where the practice requires it, or it is ordered by the court or judge.

In New-York, the *writ* of injunction, as a provisional remedy, is abolished by the Code of Procedure, and an injunction by *order* substituted.[8] The order may be made by the court in which the action is brought, or

[1] N. Y. Printing and Dyeing Establishment v. Fitch, 1 Paige, 98. Ogden v. Kip, 6 J. Ch. R. 60.

[2] Osborne v. Taylor, 5 Paige, 515.

[3] Fellows v. Fellows, 4 J. Ch. R. 25. Waller v. Harris, 7 Paige, 167.

[4] Snowden v. Noah, Hopk. 347.

[5] Walker v. Devereaux, 4 Paige, 229.

[6] 2 R. S. 179, § 71.

[7] In the matter of Hemiup, 2 Paige, 316.

[8] Code, § 218.

by a judge thereof, or by a county judge, and when made by a judge, may be enforced as the order of the court.[1]

The code defines in what cases a preliminary injunction may be granted. It makes no provision in relation to *final* injunctions, which are consequently governed by the former practice, except as modified by other parts of the code.

The provision in relation to *preliminary* or temporary injunctions is thus: "Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it shall appear, by affidavit, that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition."[2] A subsequent section[3] provides that an injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. Other sections regulate the practice as to notice, security, and motions to vacate injunctions.

If the cause for granting the injunction exist at the time of filing the complaint, an injunction should not be granted unless a demand for an injunction is contained therein; if the grounds for issuing it arose after filing the complaint, the application for it may be made upon affidavit disclosing such grounds.[4] The complaint may be so drawn, that an affidavit verifying the same will entitle the party to an injunction.[5] But a party will not be entitled to a temporary injunction pending the action, unless the complaint discloses a case entitling the plaintiff to final relief by injunction.[6] The law with respect to injunctions has not been

[1] Code, § 218.
[2] Id. § 219.
[3] Id. § 220.
[4] Hovey v. McCrea, 4 How. 31.
[5] Koome v. Webb, 3 id. 327. Krom v. Hogan, 4 id. 225. Miliken v. Carey, 5 id. 272, contra.
[6] Corning v. Troy Iron Co. 6 How. 89. Ward v. Dewey, 7 id. 17. Hulce v. Thompson, 8 id. 475. Wordsworth v Lyon, 5 id. 463

materially changed by the code.[1] The cases to which the remedy is applicable are the same now as before the code. The former decisions on this subject are still good authority on all questions of jurisdiction.

It has been held that no court in this state can now rightfully enjoin a defendant from proceeding in a suit in another court of the state, having equal power to grant the relief sought by the complaint.[2]

The foregoing remarks are sufficient by way of introduction to the subject under discussion. It will be impossible to notice, in this chapter, all the cases in which the remedy by injunction is appropriate. It will be sufficient to bring under review a few of the cases under the leading heads of equity jurisdiction, where this remedy has been applied. We shall treat the subject under the following subdivisions:

1. Injunctions to stay proceedings in courts of law or equity.

2. To restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel, and for the delivering up of bonds, notes, &c.

3. To prevent the wasting of assets or other property pending the litigation.

4. To restrain trustees from assigning the legal estate, or assignees from making a dividend.

5. To prevent the removing out of the jurisdiction, marrying or having any intercourse, which the court disapproves of, with a ward.

6. To restrain the commission of waste and trespass.

7. To prevent the infringement of patents and the violation of copy rights, and the unauthorized publication of letters, &c.

8. To suppress the continuance of public or private nuisances, purprestures, &c.

9. To restrain the multiplicity of suits, to quiet possessions, and to repress vexatious litigation; and to protect corporations in the enjoyment of their franchises.

10. To restrain a judgment debtor from disposing of his property.

11. To restrain the usurpation of corporate powers, and the alienation of corporate property, and to restrain insolvent corporations.

These are far from being all the cases to which this remedial process has been, or may be applied, but the discussion of them will afford a general view of the nature of the jurisdiction.

[1] Corning v. Troy Iron Co. 6 How. 92. [2] Grant v. Quick, 5 Sandf. S. C. R. 612 Wordsworth v. Lyon, 5 id 463.

SECTION II.

OF INJUNCTIONS TO RESTRAIN PROCEEDINGS IN OTHER COURTS.

There is no branch of equity jurisprudence which met with so much disfavor and opposition, in the early stages of the law, as the granting of injunctions generally; and more particularly so, when the object was to restrain the proceedings of other courts. It was one of the charges against Cardinal Wolsey, that he examined many matters in chancery after judgment had been given at law, and that he unduly granted injunctions.[1] His successor, Sir Thomas More, was cautious in granting injunctions, but when granted he upheld them with firmness, when he thought that justice required his interference with the judgments of the courts of common law.[2] The struggle between the courts of law and equity, with respect to this jurisdiction, was not brought to a crisis, till the time of Lord Ellesmere, chancellor to James the 1st. Lord Coke, chief justice of the king's bench, denied the power of the chancellor, and boldly gave judgment in a case in which the chancellor had granted an injunction to stay proceedings; he bailed, and afterwards discharged a person who had been committed by the lord chancellor for breach of an injunction against suing out execution on a judgment; and, in another case, he got Justice Dodderidge, a *puisne* judge of the king's bench, to express a strong opinion, along with him, that the interposition of equity in actions at law was illegal.

Still the chancellor continued to exercise his jurisdiction as before; and in a case where a judgment had been fraudulently obtained in the court of king's bench, he pronounced a decree to set it aside, and granted a perpetual injunction against execution. The matter was at length brought before the king, who, by the advice of the law officers of the crown, decided in favor of the jurisdiction of equity.[3]

But though the jurisdiction was thus firmly established, yet the practice of issuing injunctions to restrain proceedings at law, and indeed in other cases, was sparingly exercised until the time of Lord Eldon, more

[1] Lord Campbell's Life of Cardinal Wolsey, p. 385.

[2] Lord Campbell's Life of Lord Ch. More, p. 415.

[3] Lord Campbell's Life of Lord Ch. Ellesmere, where the controversy is stated at length, 210, 213.

than a century later. Lord Thurlow, it is said, would hardly grant an injunction where the parties had a remedy at law. Before his time, there are not more than half a dozen instances of each species of injunction, and in these relief was as often denied as granted. "Now," says an admirer of Lord Eldon, "injunction is, it is well known, the right arm of the court, pervading the workshop of the artizan, the studio of the artist; entering alike the miner's shaft, and the merchant's counting house. Almost all the principles upon which this relief is granted or refused, the terms and conditions upon which it is dissolved, revived, continued, extended or made perpetual, are to be found in Lord Eldon's judgments alone."[1]

A bitter controversy, at one time, existed in New-York, between the supreme court and the court of chancery, with respect to the power of the former to commit for contempt.[2] And there has always been, while the two courts were kept separate, a strong party adverse to the existence of the court of chancery as a distinct tribunal. Nevertheless, the supreme court held that an existing injunction, although operating only on the parties, their attorneys and agents, would be noticed by the court, for the purpose of promoting the ends of justice, and of preserving harmony between the two courts.[3]

Injunctions to stay proceedings at law are sometimes granted before the action is at issue; sometimes after issue and before trial; sometimes after verdict and before judgment, and sometimes after judgment.

The causes for which the injunction in these cases may be allowed, are various. In one instance, in an action at law against an accommodation indorser, the court granted an injunction in his favor until the creditor should have first pursued his remedy against the principal debtor, from whom he had ample security by bond and mortgage.[4] Where the principles of equity require that the action against the surety should be postponed until the creditor has exhausted his remedy against the principal debtor, the action against the surety will be stayed by injunction; and if satisfaction of the debt be obtained from the principal, the injunction against the further prosecution of the surety will be made perpetual. As the surety, on paying the debt, is entitled to be subrogated to all the rights of the creditor, and is entitled to the securities which he has taken, if there be any suspicion as to the validity of those securities,

[1] Lord Campbell's Life of Lord Eldon, pp. 501, 502.

[2] Ex parte Yates, 4 J. R. 317; S. C. in error, 6 id. 337. Yates v. Lansing, 5 id. 282; S. C. in error, 9 id. 395.

[3] Hoyt v. Gelston 13 J. R. 139.

[4] Hayes v. Ward, 4 J. Ch. R. 123.

it was thought by the chancellor that their validity should be tested by the creditor in an action brought in his own favor, and at his own expense, rather than that the surety should be at once called upon to pay the debt, and then be turned over to a doubtful remedy. And accordingly he restrained, by injunction, the action against the surety, until the further order of the court, to enable the creditor to enforce the collection of a bond and mortgage taken to secure the debt, and which, as between the creditor and the surety, was the primary fund.[1]

The cases in which relief in equity may be granted, against actions at law, are infinite. The jurisdiction does not spring from any superiority of a court of equity over a court of law, but originates in the fact, that the party complained of is making a use of the jurisdiction at law, contrary to equity and good conscience.[2] There are numerous instances where a defendant has a good defense to an action at law, which, by mistake, accident or fraud of the other party, he is prevented from making. In all these cases equity will interpose, and make the defense available. In most of the cases we have considered under the head of fraud, accident and mistake, the remedy was made effectual by injunction.

We can learn when equity will stay an action at law, by adverting to some of the instances in which it will not interpose. In the first place, it is well settled that equity will not restrain an action at law by a preliminary injunction, on the application of the defendant in such action, if he has a perfect defense at law.[3] Unless the injunction is necessary to make the defense available; if it will be as effective without, as it will be with the aid of equity, there is no reason for withdrawing the action from the forum which the plaintiff has sought.[4]

On the same principle, a party is not entitled to an injunction to stay proceedings in an action at law upon an award, on the ground that the award was obtained by the fraud or corruption of the arbitrators, or that there never was any submission to them as arbitrators.[5] In such a case there is a perfect defense at law upon the award, and relief in equity is not necessary. Nor will equity afford relief to a party who, by his own negligence, has lost the opportunity of making a defense at law.[6] Nor will it grant an *ex parte* injunction upon a mere *fishing* bill; as where

[1] Hayes v. Ward, 4 J. Ch. R. 134.

[2] Hill v. Turner, 1 Atk. 516.

[3] N. Y. Dry Dock Co. v. The Am. Life Ins. Co. 11 Paige, 384. Mitchell v. Oakley, 7 id. 68.

[4] Osborne v. Taylor, 5 Paige, 515. Grant v. Quick, 5 Sand. S. C. R. 612.

[5] Snediker v. Pearson, 2 Barb. Ch. R. 107.

[6] Dodge v. Strong, 2 J. Ch. R. 228 Murray v. Graham, 6 Paige, 622.

it is sought to restrain a suit at law, and no fact is positively sworn to as being in the knowledge of the defendant, which, if proved, would defeat him in the action.[1]

The court will not, unless perhaps in some very special case, exercise the power by injunction, of restraining proceedings which have been previously commenced in the courts of another state. Not only comity, but public policy, forbids the exercise of such a power.[2] As was said by Chancellor Walworth, in Mead v. Merritt: If this court should sustain an injunction bill to restrain proceedings previously commenced in a sister state, the court of that state might retaliate upon the complainant, who was defendant in the suit there; and by process of attachment might compel him to relinquish the suit subsequently commenced here. By this course of proceeding, the courts of different states would indirectly be brought into collision with each other in regard to jurisdiction; and the rights of suitors might be lost sight of in a struggle for what might be considered the legitimate powers and rights of courts. Nor will the courts of the United States enjoin proceedings in a state court.[3] Nor can the state courts enjoin proceedings in the courts of the United States.[4]

The cases which have hitherto been considered, are where relief has been sought against an action at law, in its early stages, and before it has proceeded to issue. At the revision of the laws in 1830, it was deemed advisable to impose some restrictions upon the power of granting injunctions in actions at law, *after issue*;[5] and the code of procedure extended some of these restrictions to all cases.[6] In addition to this, the rules of the court, at an early day, contained salutary provisions against the abuse of the power, the principles of which were incorporated in the statutes before mentioned, with other improvements.[7] As these enactments affect the jurisdiction of the court, as well as its practice, they seem important to be stated in this connection.

The Revised Statutes enact, that no injunction shall be issued to stay the trial of any personal action *at issue* in a court of law, until the party applying therefor shall execute a bond, with one or more sufficient sureties, to the plaintiff in such action at law, in such sum as the chancellor or master allowing the injunction shall direct, conditioned for the payment

[1] Burgess v. Smith, 2 Barb. Ch. R. 276. Mead v. Merritt, 2 Paige, 402. Williams v. Harden, 1 Barb. Ch. R. 298.

[2] Mead v. Merritt, 2 Paige, 405. Burgess v. Smith, 2 Barb. Ch. R. 280.

[3] Diggs v. Wolcott, 4 Cranch, 179.

[4] McKee v. Voorhees, 7 Cranch. 279.

[5] 2 R. S. 188 et seq.

[6] Code, § 222.

[7] See Chancery Rules of Ch's Lansing and Kent, 41, 42, 43.

to the said plaintiff and his legal representatives, of all moneys which may be recovered by such plaintiff or his representatives, or the collection of which may be stayed by such injunction, in such action at law, for debt or damages and for costs therein; and also for the payment of such costs as may be awarded to them in the court of chancery in the suit in which such injunction shall issue.[1] The foregoing relates to actions at law at any stage between issue and trial. The next section provides, that no injunction shall be issued to stay proceedings at law in any personal action, *after verdict*, and *before* judgment thereupon, unless a sum of money, equal to the amount for which the verdict was given, and the costs of the suit, shall be first deposited with the court of chancery, by the party applying for such injunction, or a bond for the payment thereof, shall be given as thereafter directed. And the succeeding section enacts, that no injunction shall issue to stay proceedings at law, in any personal action, *after* judgment, unless, 1st. A sum of money, equal to the full amount of such judgment, including costs, shall be first deposited by the party applying for such injunction, or a bond in lieu thereof be given, as thereafter directed. And, 2d. Unless such party in addition to such deposit shall also execute a bond, with one or more sufficient sureties, to the plaintiff in the said judgment, in such sum as the chancellor or officer allowing the injunction shall direct, conditioned for the payment to the said plaintiff and his legal representatives, of all such damages and costs as may be awarded to them by the court, at the first hearing of the cause. It is also provided, that money so deposited to obtain an injunction, after verdict or judgment, may be paid over to the plaintiff in the action at law, on his giving adequate security to refund it, when ordered by the court.

The foregoing provisions relate to *personal* actions. To cover the whole ground of equity jurisdiction it was further enacted, that no injunction should issue to stay proceedings at law, in any action, for *the recovery of lands, or of the possession thereof, after* verdict, unless the party applying therefor shall execute a bond, with one or more sureties, to the plaintiff in such action at law, in such sum as the chancellor or officer allowing the injunction shall direct, conditioned for the payment to the plaintiff in such action, and his legal representatives, of all such damages and costs as may be awarded to them, in case of a decision against the party claiming the injunction.

Such were the salutary provisions of the Revised Statutes, restrictive of the power of courts of equity to stay proceedings at law. It does not

[1] 2 R. S. 188, § 139.

belong to this treatise to point out the mode of ascertaining damages, and enforcing the securities directed to be taken. But it is obvious that cases may arise in which a deposit of the whole sum recovered, as a condition to the allowance of an injunction, would be inequitable and oppressive. The chancellor was, therefore, empowered to dispense with any deposit of moneys required by any of the preceding sections, and, in lieu thereof, to direct the execution of a bond, with sureties, conditioned to pay the amount so required to be deposited, whenever ordered by the court of chancery; or if a bond was already required, in addition to such deposit, then to direct the enlargement of the penalty and condition of such bond as might be requisite. But whenever such deposit shall be dispensed with, the bond so substituted or enlarged, shall be executed by at least two sufficient sureties. It was also foreseen that some cases might arise in which the interposition of the court might be invoked, in which both a deposit of money or the giving of a bond might be dispensed with. It was, therefore, accordingly enacted, that whenever an injunction should be applied for, to stay proceedings at law, in any action after judgment or verdict, on the ground that such judgment or verdict was obtained by *actual fraud*, the chancellor should have power to dispense with the deposit of any moneys or the execution of any bond.[1]

On the abrogation of the court of chancery by the present constitution, and the transfer of its jurisdiction to the supreme court, all the laws then in force, relating to the court of chancery and its officers, were made operative, as far as applicable, to the supreme court and its judges and officers.[2] And the Code of Procedure assumes that the foregoing provisions of law are in force, and it merely requires that when no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking, on the part of the plaintiff, with or without sureties, to the effect, that the plaintiff will pay to the party enjoined such damages, not exceeding the amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto.[3] This was a mere revision and modification of the 31st rule of Chancellor Walworth.

A compliance with the statute requirments is essential to the jurisdiction of the court, and without which the injunction will be discharged

As an injunction to restrain proceedings at law is directed only to the parties, and assumes no superiority over the court in which the action

[1] 2 R. S. 190, § 147.
[2] Judiciary Act, L. of 1847, § 16, p. 323.
[3] Code, § 222.
[4] Jenkins v. Wilds, 2 Paige, 394.

is pending, but is granted solely on the ground that some equitable circumstances exist which render the prosecution at law against conscience, there is no reason why an injunction should not be granted, by the court in which the action is pending, if the court has jurisdiction both at law and in equity. To make the injunction effectual, it may be necessary to bring in other parties, and the transaction out of which the equity arises may be of too complicated a nature to be investigated in a motion in the same court for summary relief. To prevent fraud, or great injustice, in such a case, although the court has jurisdiction to grant relief by a motion in the same cause, it will, nevertheless, merely stay proceedings for a limited time, to enable the complaining party to seek the aid of a court of equity.[1] The court does not in such cases enjoin *itself*, but restrains the plaintiff from proceeding in a manner that deprives the defendant of some defense to which he is equitably entitled, or which gives to the plaintiff an advantage which, in conscience, he should not possess. The New-York code of procedure has afforded some facilities for investigating facts on a motion, which the courts did not formerly have, unless in an expensive and imperfect manner by directing an issue. Now a reference may be taken, for this purpose, in any stage of the action.[2] But it is believed that many cases may still arise where this remedy, if not entirely ineffectual, is greatly inadequate.

The general rule is, that equity will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defense. If a party will suffer a judgment to pass against him by neglect, he cannot have relief in equity for a matter of which he might have availed himself at law.[3]

Suppose a plaintiff should recover a verdict for a debt which had been paid, it would be manifestly inequitable that he should enjoy the fruits of his recovery. Still, even in such a case, equity could not relieve, unless the plaintiff knew the fact to be otherwise, and the defendant was ignorant of it at the trial.[4] But should the defendant, knowing of the payment, submit to go to trial, without obtaining the plaintiff's answer to a bill of discovery, or, under the present practice, without calling the

[1] Lansing v. Orcott, 16 J. R. 4. Smith v. Paige, 15 J. R. 395.

[2] Code, § 271, sub. 3.

[3] Lansing v. Eddy, 1 J. Ch. R. 51. Le-

Guin v. Gouverneur & Kemble, 1 J. Cas.

[4] Williams v. Lee, 3 Atk. 223. Gainsborough v. Gifford, 2 P. Wms. 424.

plaintiff as a witness to prove the fact on the trial, equity would not relieve.[1]

There may be cases where the rule is subject to some modification, but, in general, where a party has *neglected* his means of defense at law, equity will not interfere. Thus, where a defendant at law knew of the existence of facts constituting a defense and omitted to prove them on the trial, and acquiesced nearly three years in the recovery, the court refused to relieve him.[2] So if the judgment be paid, and the plaintiff in the execution still claims to enforce it, a bill in equity to stay the proceeding is in general unnecessary, because there is a prompt and adequate relief at law by motion.[3] But should the relief be sought by a person not a party to the judgment, on whose land it was attempted to be enforced, a resort to an action might be indispensable, and an injunction would be an appropriate remedy.[4]

Where the whole or a part of the judgment has been paid, and the plaintiff, notwithstanding, is proceeding to collect the whole judgment, or the part thereof which has been paid, the proper remedy of the defendant is by a summary application to the court in which the judgment was recovered.[5] Such court can, in general, afford relief either by an order to stay execution, and in case of full payment, by an order directing satisfaction to be acknowledged. The statute requiring a deposit of the amount of the judgment, as a condition of relief, does not apply to summary applications in the court which pronounced the judgment. With respect to judgments obtained by confession by virtue of a bond and warrant of attorney, it has long been settled that the court in which the judgment is entered has an equitable jurisdiction, and may examine and decide whether it was fairly obtained or not, either on the application of the defendant, or of a creditor having an interest in the inquiry.[6]

If, in case of an alleged payment of a judgment, it becomes necessary to seek relief in a court of equity, and it is desirable that the giving of a bond, or the making of the deposit of the amount, should be dispensed with, it is incumbent on the party thus seeking to be excused to state in his complaint the time, circumstances and amount of each payment, so as to enable the court, by mere computation, to fix the amount of the bond or deposit; and to give the party who is sought to be enjoined an opportunity to meet and deny the fact of such payments, if they have not been

[1] Williams v. Lee, 3 Atk. 223. Gainsborough v. Gifford, 2 P. Wms. 424. Le-Gwin v. Gouverneur, 1 J. Cas. 436.

[2] Lansing v. Eddy, 1 J. Ch. R. 51.

[3] Id.

[4] Lansing v. Orcott, 16 J. R. 4.

[5] Christie v. Bogardus, 1 Barb. Ch. R. 167.

[6] Frazer v. Frazer, 9 J. R. 80. Brinkerhoof v. Marvin, 5 J. Ch. R. 310.

actually made as charged in the complaint.[1] A mere general statement that the judgment has been paid, is, it seems, not enough to warrant the court in excusing the party from complying with the requirements of the statute, and notice should be given to the adverse party of the intended application, that the court, after hearing both sides, may be enabled to judge of the propriety of granting the injunction, and of dispensing with a bond or a deposit.[2] If the facts be not within the personal knowledge of the plaintiff, he should obtain the affidavits of those by whom they can be proved, or such other evidence as will satisfy the court, beyond all reasonable doubt, that the facts alleged in the complaint are true.[3]

A plaintiff, whose remedy was complete at law, but who by accident was prevented to make it there, may be relieved in equity against the judgment.[4] The same reason applies, where the defense has not been made by reason of a mistake of the defendant. As where a plaintiff recovers a debt at law against a defendant, and the latter afterwards finds a receipt, under the plaintiff's own hand, for the money in question. In such case the recovery is against conscience, and though the receipt was at the time of the trial in the defendant's hands, yet *if he was not apprised of it*, it seems he is entitled to relief in equity. It is against conscience that the plaintiff should be twice paid for the same debt; so if the plaintiff's own book appeared to be crossed, and the money was paid before the action brought.[5]

But the court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part.[6]

The cases in which relief against proceedings at law has been most frequently sought, are where the rights of the party are of an equitable nature, or were incapable of being asserted in a court of law. If the claims of the defendant arise out of the same transaction, there is a natural equity that one should compensate the other, and that the balance only should be recovered. This natural equity was, by the civil law, ex-

[1] Christie v. Bogardus, 1 Barb. Ch. R. 172.

[2] Id. Campbell v. Morrison, 7 Paige, 157.

[3] Id.

[4] Jones v. Woodhull, 1 Root, 298. Doty v. Whittlesey, id. 310. Gay v. Adams, id. 105. Degraffenreid v. Donald, 2 H. & M. 10.

[5] Gainsborough Gifford, 2 P. Wms. 424.

[6] Foster v. Wood, 6 J. Ch. R. 90. Lansing v. Eddy, 1 id. 51. Duncan v. Lyon, 3 id. 351.

tended even to unconnected claims which were liquidated, or were capable of liquidation by mere computation. The common law required that distinct and independent demands should be sued for by the respective parties, in separate actions, against each other.[1] There are numerous cases not coming within the statute of set-off, where evidence, in mitigation of damages, is admissible at law. Where, on the sale of a chattel, there is either warranty or fraud with reference either to its quality or value, the defendant might, under the general issue, upon notice of such defense, in an action brought against him for the price, prove the fraud or breach of contract in mitigation of damages. This is the foundation of the doctrine of recoupment.[2]

Under the New-York code of procedure, the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and it is provided, that hereafter there be but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, to be denominated a civil action.[3] The code, however, allows the plaintiff to unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of the same transaction, or transactions, connected with the same subject of action. But the causes of action so united must all belong to one of the classes into which actions are divided, and must affect all the the parties to the action, and not require different places of trial, and must be separately stated.[4]

These provisions of the code give rise to a great variety of questions, some of which have already been subjected to legal discussion, and to the decision of the courts. There are far more which remain yet to be decided. In an ejectment it has been held that a defendant cannot, in an answer, denying the plaintiff's legal title, set up an equitable defense, looking to affirmative relief.[5] One objection to this uniting of an equitable with a legal defense is, that the latter requires a trial by jury, and the former by the court.[6] That decision, however, was made prior to the amendments of the code in 1852. By the amendments, a defendant is allowed not only to deny generally or specifically each material

[1] Reab v. M'Allister, 8 Wend. 115.

[2] Id. Batterman v. Price, 3 Hill, 171. Van Epps v. Harrison, 5 id. 63. Mayor of Albany v. Trowbridge, 5 id. 71. Barber v. Rose, id. 76. Nicoll v. Dusenbury, 2 Comst. 283.

[3] Code, § 69.

[4] Id. § 167.

[5] Cochran v. Webb, 4 Sandf. S. C. R 653.

[6] Id.

allegation of the complaint, which is controverted by him, or any knowledge or information thereof sufficient to form a belief, but he is also allowed to set forth, by answer, a statement of any new matter constituting a defense or counterclaim.[1] The counterclaim must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment may be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action: 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth, by answer, as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.[2]

If matter of set-off or of recoupment exist, which is the subject of a separate action, it need not be used by the defendant as a defense, either in whole or in part, but redress may be sought by a cross-action.[3] But such matter will afford no ground for an injunction against the judgment. The remedy at law is perfect.

If the matter of defense originates in the transaction out of which the cause of action springs, and affords either a legal or equitable defense to it, and is within the knowledge of the defendant, it should be used as a defense to the original action; and if it is voluntarily omitted, it would seem, on principle, that it can never be the subject of a fresh action, or afford ground for staying the proceedings in the original action.[4] The same rule, since the code of 1852, should apply to an equitable defense available at law, which the defendant omitted to make, that before governed when a legal defense was voluntarily abandoned.

It is probable that the legislature intended, by the amended code of 1852, to permit an equitable defense to be set up to a legal claim. Thus, for example, in an action to recover the possession of land, it would seem to be competent to allow a defendant, by his answer, to set up an agreement to purchase, followed up by such circumstances as entitle him to a specific performance of the contract. In such case the answer should

[1] Code, 149, as amended in 1852.
[2] Id.
[3] Halsey v. Carter, 1 Duer, 667.
[4] Foster v. Wood, 6 J. Ch. R. 90. Duncan v. Lyon, 3 id. 351. Le Guin v. Gouverneur, 1 J. Cas. 492 and notes, Shepherd's ed.

claim affirmative relief, in order that the plaintiff may, if he pleases, reply to the same. An answer, in such a case, partakes of the nature of a complaint. The power conferred on the court to give judgment, under the code of 1852, is broad enough to reach every case of this nature, as well as cases of interpleading.[1] We are not without precedent for cases under the old practice, where both parties are actors. The action of replevin affords an example, and the corresponding action under the code, for the claim and delivery of personal property, is another instance of the same kind. Such an action will become more or less complicated, and will be attended with many difficulties.[2] Under the original code, the better opinion was, that an equitable defense could only be made available by a cross-action.[3] An original and cross-bill were always treated as one suit, and the proceeding was less complicated than if the whole were embraced in a single set of pleadings.

If a judgment be obtained by fraud, relief may sometimes be had by motion in the same court; but when that relief cannot be obtained, or is inadequate, a court of equity will interpose. In one case, Lord Loughborough said, if a judgment was obtained at law against conscience, by concealment, relief could be afforded in equity.[4] So a decree obtained by fraud and covin, may be relieved against, not by rehearing or appeal, but by an original bill.[5] And the general principle was stated, on a recent occasion, in the supreme court of the United States, with regard to injunctions after a judgment at law, that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed by any fault or negligence in himself, or his agents, will authorize a court of equity to interfere, by injunction, to restrain the adverse party from availing himself of such judgment.[6]

This relief is also sometimes granted by requiring satisfaction to be acknowledged by the plaintiff,[7] and sometimes by granting a new trial in the court of law.

Thus, in one case in New-York, it was said, that the court of chancery would, on a bill filed for that purpose, grant a new trial in the court of

[1] Code of 1852, § 274.

[2] Dewey v. Hoag, 15 Barb. 365. Haire v. Barker, 1 Seld. 362.

[3] Otis v. Sill, 8 Barb. 201. Crary v. Goodman, 9 id. 657. Cochran v. Webb, 4 Sandf. S. C. R. 653.

[4] Mitchell v. Harris, 2 Ves. jr. 135.

[5] Bradish v. Gee, Ambler, 229.

[6] Truly v. Wanser, 5 How. 141.

[7] Barnsly v. Powell, 1 Ves. 289, 119.

common pleas, on the ground of newly discovered evidence, that court not having at that time jurisdiction to grant a new trial, except for irregularity. But it was said, to entitle the party to that relief, he must have used all the means in his power to establish at the trial the fact which he seeks to prove.[1]

Applications to courts of equity for a new trial, after a verdict at law, are very rare in modern times, since courts of law exercise the same jurisdiction, and to a liberal extent. Lord Redesdale, on one occasion[2] said, that a bill for a new trial was watched by equity with extreme jealousy, and it must see that injustice has been done, *not merely through the inattention of the parties;* and he held it to be unconscientious and vexatious to bring into a court of equity a discussion which might have been had at law. Even in the old cases, before new trials were much known, and used at law, the court of chancery proceeded with great caution in awarding a new trial at law. And Lord Hardwicke, in Richards v. Symes, (2 Atk. 319,) refused a new trial, on the suggestion that the party was not apprised of a particular evidence, and therefore not prepared to meet it. The chancery cases have generally agreed in granting a new trial on the discovery, since the trial, of a receipt or acquittance in full of the demand.[3]

It is only in cases of newly discovered evidence, surprise, fraud, or being deprived of the means of defense by circumstances beyond the control of the party, and the like, that will in any case warrant the interposition of equity in granting a new trial at law.[4] It will not be granted to enable a party to impeach a witness,[5] or because the verdict was against evidence. And in all these and many other cases, courts of law are now in the habit of granting new trials, if the application be made promptly, and the party was not in fault in going to trial unprepared, or was misled by the artifice of the adverse party.[6]

When the remedy at law is adequate, it is in general contrary to the settled practice of the court to interfere by an injunction from a court of equity.

A court of equity will not disturb the verdict of a jury because the

[1] Floyd v. Jaynes, 6 J. Ch. R. 479.

[2] Bateman v. Willoe, 1 Sch. & Lefr. 201.

[3] Smith v. Lowry, 1 J. Ch. R. 320, 324. Gainsborough v. Gifford, 2 P. Wms. 424. Williams v. Lee, 3 Atk. 223.

[4] Harrison v. Harrison, 1 Litt. 140. Gales v. Shipp, 2 Bibb, 241. Pegram v. King, 2 Hawks, 605.

[5] Woodworth v. Van Buskirk, 1 J. Ch. R. 432.

[6] Vandervoort v. Smith, 2 Caines, 155. Hollingsworth v. Napier, 3 id. 182. Palmer v. Mulligan, id. 307. Williams v. Baldwin, 18 J. R. 489.

damages are excessive. Relief in such cases in courts of law is plenary and adequate.[1] Nor will an injunction be granted to stay proceedings at law on a judgment, on the ground that the defendant at law was prevented, by public business, from making due preparations for, and attending at the trial, and that the plaintiff had, on the evidence of one witness, whom he had suborned to swear falsely, recovered a verdict for a much larger sum in damages than he was justly entitled to; and that the supreme court had refused to grant a new trial in the cause.[2]

On the same principles, if the same court have granted a new trial, on conditions which the party failed to perform within the time prescribed by the rule, and such failure be not occasioned by the act of the adverse party, or by unavoidable necessity, equity will not grant relief.[3] And it will never grant relief for the purpose of a new trial, where the party lost his opportunity of defense by his own negligence.

An award of arbitrators stands on the same footing, in this respect, as a judgment. The court will not grant an injunction to stay an action at law, on an award, on the ground that the plaintiff was surprised by the principal witness for the defendants swearing falsely before the arbitrators, and that he could have proved the falsehood of the testimony, if the arbitrators would have adjourned the hearing for that purpose, which they refused to do, though requested by the plaintiff, who offered to enlarge the time of making the award.[4] The rule is the same in equity as at law, where a new trial will not be granted, merely to give a party, who has gone voluntarily to trial, an opportunity to impeach the testimony of witnesses against him.[5]

SECTION III.

OF INJUNCTIONS TO RESTRAIN THE INDORSEMENT OR NEGOTIATION OF COMMERCIAL PAPER, THE SAILING OF SHIPS, THE TRANSFER OF STOCK, THE ALIENATION OF LAND, OR OF SPECIFIC CHATTELS.

WE proceed, in the next place, to consider some of the cases in which courts of equity will interfere, by injunction, to restrain the indorsement of promissory notes and bills of exchange, the sale of land, the sailing of

[1] M'Connell v. Hampton, 12 J. R. 234.
[2] Smith v. Lowry, 1 J. Ch. R. 320.
[3] Dodge v. Strong, 2 id. 228.
[4] Woodworth v. Van Buskirk, 1 J Ch. R. 432.
[5] Id.

a ship, the transfer of stock, the alienation of specific chattels, and to compel the delivering up of instruments, &c.

Relief under this head is very generally accompanied with an injunction restraining an action at law.

It is a general principle, applicable to the transfer of commercial paper, as bills of exchange, promissory notes and the like, that a transfer before the paper is dishonored carries no suspicion on the face of it, and the holder, receiving it on its own intrinsic credit, is not bound to inquire into any circumstances existing between the assignor and any of the previous parties to the bill or note, as he will not be affected by them, unless, indeed, the circumstances under which he takes the same be such as would naturally have excited the suspicion of a prudent and careful man.[1] Hence, should the note or bill be affected with fraud in its inception, but transferred in the usual course of business, for a fair and valuable consideration, parted with at the time, and without notice of the fraud, or other infirmity in the title, it cannot be impeached by the maker.[2] The consideration for the transfer, in order to shut out the equities of the party primarily liable, must be a payment of value, or the relinquishment of some available security or valuable right on the credit of it. The receiving it as security for an antecedent debt, or as a nominal payment for such debt, without giving up any security which the party originally had for such debt, is not enough for this purpose.[3] A party, therefore, who has given a bill or note under circumstances which, as between him and the payee, will entitle him to a defense, has an equity to restrain the holder from putting it in circulation; for, should it pass into the hands of a bona fide transferree, the defense of the former will be shut out.[4] Upon this principle, where a note had been given by the plaintiff to the defendant on a marriage brocage agreement, the lord chancellor restrained the defendant from parting with or assigning it until further order.[5]

The jurisdiction in these cases does not rest solely on the inadequacy of the remedy at law, for in many cases instruments have been ordered to be delivered up, and their circulation restrained, though they were void at law. But, in these cases, there has in general been some other ground

[1] Brown v. Davis, 3 T. R. 82, per Buller, J. O'Keefe v. Dunn, 6 Taunt. 305, per Gibbs, Ch. J. Nelson v. Cowing, 6 Hill, 339, per Bronson, Ch. J.

[2] Bay v. Coddington, 5 J. Ch. R. 54. S. C. on appeal, 20 J. R. 637. Story v. American Life Ins. Co. 11 Paige, 635. Stalker v. M'Donald, 6 Hill, 93.

[3] Id. Swift v. Tyson, 16 Peters, R. 1, contra.

[4] Smith v. Haytwell, Ambler, 67. 1 Fonb. Ex. B. 1, ch. 1, § 8, n. y. Chitty on Bills, 120.

[5] Smith v. Haytwell, Ambler, 66.

of equity, such as fraud, the necessity of a discovery, the age of the party entitling him to protection, or the like, which called for the interposition of the court. Thus, where an unconscionable bargain was made with an infant before he became of age, and a note of hand taken from him immediately on his coming of age, the court, on a bill by the executor, ordered it to be cancelled.[1] The court, however, allowed the defendant to bring an action against the executor for the original consideration of the note, if brought within a specified time. And the chancellor said, that the attempt to substantiate such a bargain with an infant was a principal ingredient with the court to relieve.

In Minshaw v. Jordon, (3 Bro. 18, n.) a bill was filed to have a promissory note delivered up and canceled, as obtained by fraud, and without consideration. The master of the rolls retained the bill, and allowed the defendant to proceed at law upon the note, and the verdict being found against it, he then decreed it to be given up to the plaintiff to be cancelled.

The question, whether an instrument void on its face, or only void upon collateral circumstances, shall be delivered up, or whether the party shall not be left to make his defense at law, has met with conflicting decisions. Chancellor Kent, after reviewing the cases, inclines to think that the weight of authority, and the reason of the thing, are equally in favor of the jurisdiction of a court of equity, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proofs taken in the cause, and that these assumed distinctions are not well founded.[2] And in the case before him, where an action at law was brought to recover a bond good upon its face, but to which the obligor had a good defense in equity, arising from matters *dehors* the bond, he ordered it to be delivered up and canceled, and that the plaintiff in the action at law be perpetually enjoined against the prosecution at law. Lord Eldon evidently favored the jurisdiction. He thought it no objection that there was a defense at law; that it extended to bills to deliver up promissory notes, in complicated cases, where the evidence of the defense might be lost, and to bills to have void policies of insurance delivered up. And he thought it was not unwholesome, that an instrument should be delivered up, upon which a demand may be vexatiously made as often as the purpose of vexation may urge the party to make it.[3] In one case, in New-York, Chancellor Kent entertained a bill to set aside and cancel a deed, on the ground of a fraudulent alteration, fully proved

[1] Brooke v. Gally, 2 Atk. 34. Hamilton v. Cumming 1 J. Ch. P.

521, 522, where many of the English cases are reviewed.

[3] Bromley v. Holland, 7 Ves. 3 21.

a court, and which had been also proved in an action of ejectment brought by the defendant against the plaintiff, and a verdict found for the defendant in possession. In that case the defendant, after being defeated at law, caused the deed to be proved by an aged witness and recorded, and threatened to bring another action of ejectment. The court therefore not only ordered the deed to be canceled, but enjoined the defendant from using the record as evidence of title.[1]

Chancellor Sandford entertained jurisdiction against a deed fraudulently obtained; and he directed that the contested deed and promissory note be brought into court for inspection, and he restrained proceedings at law during the pendency of the bill in equity for the same matter.[2] His decision was affirmed by the court of errors,[3] and met the approbation of Chancellor Walworth.[4] The jurisdiction to set aside and cancel deeds and other instruments fraudulently obtained, and which were attempted to be set up inequitably, has been fully asserted by learned judges in other cases.[5] In a recent case, the jurisdiction was held to apply to a bill to procure the cancellation of promissory notes, given upon an illegal consideration. Though such notes are void at law, yet equity has power to decree that they be given up.[6]

But a court of equity will not entertain a bill to stay proceedings in an action at law upon a promissory note, upon the ground of usury, where the bill praying for an injunction alleges no defect in the means of establishing his defense at law, and seeks for no discovery, and the objection is taken by the defendant in his answer that the remedy at law is perfect.[7] The objection that there is nothing in the complainant's bill to show that he has not a perfect defense at law upon the note, is an objection which goes to the jurisdiction of the court of equity; and such objection, when taken by demurrer, or insisted on in the answer, is fatal to the complainant's right to sue in a court of equity.[8]

Nor will the court enforce the penal laws of the state or the by-laws of a corporation, by injunction, unless the act sought to be restrained is a nuisance.[9] Nor will it restrain, by that process, the publication of a libel, though its publication might injure the business or character of

[1] Bushnell v. Harford, 4 J. Ch. R. 301.
[2] Apthorpe v. Comstock, Hopk. 143.
[3] S. C. in error, 8 Cowen, 386.
[4] S. C. 2 Paige, 482.
[5] Loomis v. Cline, 4 Barb. 453. Harrington v. Bigelow, 11 Paige, 349.
[6] Thompson v. Graham, 1 Paige, 384.
[7] Minturn v. Farmers' L. and T. Co., 3 Comst. 498.
[8] Id. Morse v. Hovey, 9 Paige, 198.
[9] Mayor of Hudson v. Thorne, 7 id. 264.

the plaintiff.[1] Nor will it restrain the collection of a tax, where the assessment is merely erroneous and not void.[2]

An injunction will be granted against the sale of real estate, when the ends of justice require it. Accordingly, where the owners of land, through which a turnpike road was laid, were entitled to construct the road, under the inspection of the company, by a certain time, in lieu of paying assessments by the commissioners, and where the latter, without giving the requisite time, were proceeding to sell the lands of the plaintiffs to raise the assessment, the court granted a temporary injunction to enable the latter to build the road without such sale.[3] So a vendor defendant to a bill for specific performance of an agreement for the sale of an estate, will be restrained from conveying the legal estate, on the ground that the plaintiff might thus be put to expense, by the necessity of making another party, when the cause might be just ready for hearing.[4]

In most countries, it is said to be in the power of the majority, either in number or value, of the part owners, to send the ship on a voyage. But the court of admiralty has authority to arrest and detain the ship, upon the application of a dissenting part owner, until security be given by the other part owners to the full value of his share. But if the respective shares be not apparent, and their amount be a subject of dispute, it has been said that it has not then the power to order security to be given. But, in such case, equity will interfere, and by injunction restrain the sailing of the ship, till the amount of the share for which security is to be given shall be ascertained. But the court will decline to interfere, if the plaintiff has been guilty of delay.[5]

Another subject, to which the remedy by injunction has been applied, is to restrain the transfer of stock. In one case, Lord Eldon restrained by injunction the transfer of stock standing in the name of the defendant, who was attorney and steward of the plaintiff, upon strong proof that it was the produce of the money of his principal. In that case, the sum which the defendant had invested in government securities was very large, and the agent had not discriminated between his own funds and

[1] Brandeth v. Lance, 8 Paige, 24.

[2] Livingston v. Hollenbeck, 4 Barb. 9. Van Rensselaer v. Kidd, id. 19.

[3] Couch v. Ulster and Orange Turnpike, 4 J. Ch. R. 26.

[4] Echliff v. Baldwin, 16 Ves. 267.

[5] Haly v. Goodson, 2 Meriv. 77. Christie v. Craig, id. 137. Colly. on Part. 678–9. Abbott on Ship. 104, and see notes.

those of his principal. He had rendered no account for many years; and the court, for these reasons, thought that the defendant, having improperly confounded the money of the principal with his own, in the purchase of stock, should not be permitted to dispose of it, until he showed, by his answer and an account, what belonged to himself and what to the plaintiff.[1]

There is much good sense in the rule, that casts the burden of proof upon the guilty party in case of the confusion of goods. If an inconvenience or a loss results from the agent's confounding his own money with that of his principal, it should be borne by the former; and if he cannot distinguish his own from the property of his employer, he should lose it.[2] So, where there are opposite claims to the stock under different wills, which are in contest, the court will restrain the transfer and appoint a receiver.[3] So, also, where there is a well founded apprehension that stock in the funds will be transferred, and its proceeds removed beyond the reach of creditors, or beyond the jurisdiction of the court a transfer will be restrained by injunction. Thus, where French stock, the property of the bankrupt, was transferred by him to his wife, who afterwards transferred it to her three sisters; the wife, who had a general power of appointment over moneys standing in the name of trustees in the English funds, made a will, by which she exercised that power, and died in her husband's lifetime; one of the three sisters, who was also an appointee and residuary lagatee, and usually resided in France, took out administration to her, with the will annexed: an injunction was granted, at the suit of the assignee of the bankrupt, to restrain the trustees from transferring any of the stocks in the English funds, over which the deceased's power of appointment extended.[4]

It has already been shown, under other heads, that an injunction will be granted, at the instance of a judgment creditor, who has exhausted his remedy at law, to restrain the defendant from parting with his property and for the appointment of a receiver. In such case the command is general, and is not restricted to any article in particular.

But there may be cases where the value of the article consists in its being a matter of curiosity and antiquity; and where the recovery of its intrinsic value in money would be no satisfaction to the owner; and where,

[1] Lord Chedworth v. Edwards, 8 Ves. 46.

[2] Hart v. Ten Eyck, 2 J. Ch. R. 108. Lupton v. White, 15 Ves. 432.

[3] King v. King, 6 id. 172.

[4] Stead v. Clay, 4 Russ. 550.

too, there is danger of its being injured and defaced in the mean time. In such case, the action of replevin, or its substitute under the code, is inadequate; and no remedy is complete which does not require the specific article to be delivered to the plaintiff, and restrain the defendant in the mean time from marring and defacing it. In one case, before Lord Talbot,[1] the plaintiff became entitled, as a treasure-trove, within his manor, to an old altar-piece, made of silver, remarkable for a Greek inscription and dedication to Hercules, and it came to the defendant's possession with notice of the plaintiff's title. The plaintiff could have recovered its value in an action of trover, but still the chancellor thought he was entitled to relief in equity. The bill also was to prevent the defendant from defacing the altar-piece, which would have depreciated its value, and perhaps destroyed its identity. The chancellor overruled a demurrer to the bill, thus affirming the jurisdiction of equity.

The right to be protected in the use and beneficial enjoyment of property in specie, is not confined to articles possessing any peculiar or intrinsic value. In a recent case, where certain specific chattels were placed in the possession of an agent to be held for the plaintiff, and the agent in violation of his duty to his principal contracted to sell them to a third party, whereby the plaintiff's title would be embarrassed, the court, at the instance of the principal, restrained by injunction the agent from committing the threatened act of alienation.[2] The fiduciary relation which the parties bore to each other, gave jurisdiction to the court in that case. The threatened mischief was also another source of jurisdiction.

In general, the cases where equity interposes by injunction to compel the delivering up of a specific chattel, or to protect it from injury, or from being alienated, are cases where the chattel has some peculiar value, as an article of curiosity, or memorial of affection, or insignia of office; or where the parties have stood in some relation of confidence to each other; or the case falls under some other head of equity. The altar-piece, in the Duke of Somerset v. Cookson, and silver tobacco box, in Fells v. Read, were of the former description; the masonic dresses and decorations in Lloyd v. Loaring,[3] were of the third character; and the other cases we have cited fall under the last head. If there be nothing in the case but title to the chattel in the plaintiff on the one side, an unlawful withholding of possession by the defendant, and the chattel be one capable of being estima-

[1] Duke of Somerset v. Cookson, 3 P. Wms. 390. Fells v. Read, 3 Ves. 70. Lloyd v. Loaring, 6 id. 774.

[2] Wood v. Bowcliffe, 3 Hare, 308.

[3] 6 Ves. 773.

ted in money and compensated in damages, there will be no occasion t depart from the ordinary remedies at law.

The cases already cited show that equity has jurisdiction to order chattels to be delivered up. Some of the cases on this subject were adverted to under the chapter on specific performance of agreements. But the jurisdiction is not confined to cases resting in contract, and will frequently be necessary where possession is wrongfully withheld. Lord Eldon said,[1] in discussing a demurrer to a bill to have the dresses, decorations books, papers and other effects of a masonic society delivered up, that he had no doubt of the jurisdiction of the court to have a chattel delivered up, though, in the case before him, the demurrer was allowed for defect of parties.

The principle on which relief is granted in these cases is substantially the same as that which controls the court in restraining the alienation of a chattel. It is based upon the peculiar nature of the chattel, or the relation which the parties bare to each other. If the value of the chattel depends on other circumstances than those which regulate the price of articles in the commercial world; if it be prized as the gift of a friend; or if it has been held in trust, a foundation is in either case laid for the jurisdiction of the court. In the case before Lord Loughborough, the principles are disclosed which usually govern the courts in cases of this kind. In that case,[2] the plaintiffs were members of a club, which consisted of persons who had served the office of overseer of the poor of their parish. The society had been for a long period in possession of a silver tobacco box, inclosed in two large silver cases, all which were adorned with several engravings of public transactions and heads of distinguished persons. The ornaments which had been added by different overseers, during the time the box and cases remained in their custody, began in the year 1713. This box and the cases were always kept by the overseer for the time being; who, upon coming into office, received them from the church-warden with a particular charge, in which he was enjoined, under a penalty, to produce them at all meetings of the society, and to deliver them up, on going out of office, to the senior church-warden, to be by him delivered to the succeeding overseer. They were delivered in the usual form to the defendant on his coming into office as overseer. On going out of office he refused to deliver them up, unless the vestry would pass his accounts; in which they had refused to allow him certain payments. Upon this a meeting was called, and it was resolved, by those members who attended,

[1] Lloyd v. Loaring, 6 Ves. 777. [2] Fells v. Read, 3 id. 70.

that legal steps should be taken; and, after some negotiation, an action was brought and the defendant was arrested. Two of the number in whose names the action was brought executed a release to the defendant, who thereupon delivered the box to one of them, and the bill in chancery was brought against the party originally holding the box and the two members who gave the release, to have the box and cases delivered up.

Lord Loughborough said, in all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law did not afford a remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people, who have not his feelings upon it.

He then proceeds to the peculiar circumstances of this case. The box was delivered to and accepted by the defendant upon an express trust to keep it and produce it at the meetings of the club, and at the expiration of his office to deliver it over to the senior church-warden, in order that he might give it to the next overseer. He was thus a depositary upon an express trust, and he does not perform the trust. Upon the common ground of equity, there was a right in the plaintiffs to have called upon him during the term to use it according to the trust. If he had not produced it at the meeting, he could have been compelled to produce it. So if he retains it after the expiration of the term, he can be compelled to use it according to the trust. And, in conclusion, his lordship said: "Where the right is not to use the thing as his own, but coupled with a trust to deliver it at a certain time, there is a clear jurisdiction upon the ordinary equity to compel the execution of the trust by the delivery of the thing at the time."

In this case there was an undoubted remedy at law. And the jurisdiction of a court of equity was sustained on two grounds: first, the nature of the chattel not being susceptible of an estimate in damages, and second, the violation of an express trust.

In this state, whenever a person shall be removed from office, or the term of his office shall expire, he is required to deliver over to his successor, on demand, all the books and papers in his custody as such officer, or in any way appertaining to his office; and his refusal to do so is a misdemeanor.[1] The delivery of these books and papers may also be compelled by a judge of the supreme court or county judge of the county, if the title of the applicant be clear and free from reasonable doubt. But if the title to the office is in dispute, it must be tested by a proceeding in the nature of a *quo warranto*.[2] These statute remedies would seem

[1] 1 R. S. 124.

[2] Id. § 51. The People v. Stevens, 5 Hill, 616. Code, § 428.

to render unnecessary a resort to equity in cases of this kind, if its jurisdiction be not entirely superseded. But as the jurisdiction of equity is not expressly taken away, perhaps the statute remedy is merely cumulative.

SECTION IV

Of injunctions to restrain the wasting of assets, or other property pending the litigation: restraining trustees from assigning, and a parent from removing his child out of the jurisdiction, and the ward from marrying, without consent.

We will now proceed to notice cases in which equity restrains by injunction the wasting of assets, or other property, pending the litigation.

If the contest be as to the proof of the will, or relative to granting letters testamentary, or of administration with the will annexed, or of administration in cases of intestacy, or where, by reason of absence from this state of any executor named in a will, or for any other cause, a delay is produced in granting such letters, the surrogate authorized to grant them may, in his discretion, issue special letters of administration, authorizing the preservation and collection of the goods of the deceased.[1] The administration *pendente lite* was always granted in England by the ordinary, in case of a controversy in the spiritual court concerning the right of administration to an intestate.[2] Such officer was treated merely as an officer of the court, and held the property only till the termination of the suit.[3] But notwithstanding this power of the ecclesiastical court, a court of equity would, during a litigation for probate or administration, entertain a bill for the mere preservation of the property of the deceased till the litigation was determined, and appoint a receiver.[4]

In analogy to that practice, it would seem that a court of equity, in this state, might still interpose by injunction to protect the property pending the litigation. The power given to the surrogate, though in most cases adequate, does not exclude the jurisdiction of courts of equity, which is in general more effective.

The jurisdiction will also be exercised against an executor or administrator who puts the assets in jeopardy by his insolvency, either existing

[1] Laws of 1837, p. 528, § 23.
[2] 1 Will. Ex. 311.
[3] In goods of Graves, 1 Hagg. 313.
[4] King v. King, 6 Ves. 172. Atkinson v. Henshaw, 2 Ves. & B. 85. Ball v Oliver, id. 96.

or impending.[1] So, where the husband of an executrix was in the West Indies, and in indifferent circumstances, and not a responsible person, if the executrix should get the assets into her hands, and should waste them, the plaintiff would have no remedy, because the husband must be joined in the action. And the court accordingly restrained the executrix from getting possession of the assets, and appointed a receiver with power to bring actions in the name of the executrix.[2]

The occasion for a resort to equity, in such cases, will not as often occur in the state of New-York, since the revised statutes, as formerly. By these statutes, a non-resident executor is required to give a bond, like that required of administrators, before letters testamentary can be issued to him.[3] And in other cases, if an executor becomes incompetent by law to serve, or his circumstances are so precarious as not to afford adequate security for his due administration of the estate, or he has removed or is about to remove from the state, the surrogate is empowered, on the application of any person interested in the estate, to require from the executor a bond like that required by law of administrators, and, on neglect to comply with the order, to supersede the letters testamentary and issue letters of administration to a proper person, with the will annexed.[4] The mere fact, that the executor has not in his own right an estate equal to that which he is about to administer, is not enough to warrant the surrogate to interfere. If there be no ground for supposing that the trust funds in his hands are in danger from his improvidence, or want of pecuniary responsibility, he cannot be required to give security.[5]

The jurisdiction of courts of equity in cases of this kind arises from their general jurisdiction over trusts, which cannot be taken away but by express legislation. The special power given to surrogate's courts, in these cases, is merely auxiliary to that of the supreme court, now having the same jurisdiction in equity that was formerly possessed by the court of chancery.

It is under this same jurisdiction that a trustee will be restrained from assigning the legal estate, in those cases, where trusts are allowed by law; and assignees may be restrained from making dividends.[6]

The court of chancery in England has restrained by injunction the

[1] Elmendorff v. Lansing, 4 J. Ch. R. 565. Ballou v. Earnley, 2 P. Wms. 163. Taylor v. Allen, 2 Atk. 213. Lake v. Delambert, 4 Ves. 592. Mansfield v. Shaw, 3 Mad. Ch. R. 100. Utterson v. Mairs, 2 Ves. jr. 95. Middleton v. Dodswell, 13 Ves. 266.

[2] Taylor v. Allen, 2 Atk. 213.

[3] 2 R. S. 70, § 7.

[4] Id. 72, §§ 18, 19, 20.

[5] Mandeville v. Mandeville, 8 Paige, 475. Colegrove v. Horton, 11 id. 261.

[6] 2 Eden on Inj. ov Waterman, 351.

father from moving his infant child out of the kingdom.[1] And though the father has a natural and legal right to the control of his infant children,[2] yet it must be exercised subordinate to the power of the court, to take the child from him, in cases of gross habits of drunkenness and blasphemy.[3] But this branch of the subject belongs more appropriately to another head, as we are here only treating of the *means* by which the power is carried out.

Where it appears that an infant ward is about to make a marriage without the consent of the court, an injunction will be granted not only to restrain the marriage, but also all communication with an infant, and all intercourse, either personal or by letter; and if the guardian is suspected of countenancing the intended marriage, he will be restrained from giving his consent without the leave of the court.[4]

The guardianship of a daughter determines with her marriage, as a general rule; though a doubt has been expressed whether a female ward of court be necessarily discharged, upon her marriage, from the protection of the court, without a special order from the court.[5]

If a man marry a ward of the court, without the consent of the court, he shall be committed for such contempt, though it appears that he knew not that she was a ward of the court. Every one, it seems, is bound to take notice of the appointment by the court as of a *lis pendens*.[6] And there must be a proper settlement made on the wife, before the contempt can be cleared.[7]

SECTION V.

OF INJUNCTIONS TO PREVENT WASTE AND TRESPASS.

Another and frequent ground of injunction is the prevention of waste. It is not, in this case, necessary to wait until the waste has been committed. A mere *threat* to commit waste is a sufficient cause for an injunction.[8]

Waste, at common law, was either *voluntary* or *permissive*. By *volun-*

[1] De Manneville v. De Manneville, 10 Ves. 64.

[2] Ex parte Hopkins, 3 P. Wms. 154.

[3] Per Lord Eldon, 10 Ves. 62.

[4] Eden on Inj. 349. Pearce v. Crutchfield, 14 Ves. 206. Water v. Yorke, 19 id. 451. 2 Fonb. Eq. B. 2, pt. 2, ch. 2. § 1, and notes.

[5] Matter of Whitaker, 4 J. Ch. R. 380

[6] Herbert's case, 3 P. Wms. 115. But ler v. Freeman, Ambler, 301.

[7] Stevens v. Savage, 1 Ves. jr. 154.

[8] Gibson v. Smith, 2 Atk. 182.

tary waste, was meant the actual and designed demolition of the lands woods and houses; while *permissive* waste arose only from mere negligence, and want of sufficient reparation.[1] In general, whatever does a lasting damage to the freehold or inheritance, is waste.[2] But the doctrine of waste, as understood in England, is not applicable to a new and unsettled country. Where the whole of a farm, when leased, is in a wild and uncultivated state, with the exception of a few acres, and for the use of it the lessee agrees to pay rent, the parties are held to have intended that the lessee should be at liberty to fell part of the timber, in order to fit the land for cultivation. But this right will not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently injure their value.[3]

Where nearly the whole demised premises are covered with timber, and cannot be enjoyed without a portion of it is cleared up, to what extent such clearing may be carried, before the tenant is guilty of waste, must, in an action at law, be determined by the jury. Rules of good husbandry would, doubtless, require that enough of the land should be left in woods to supply the farm with all necessary timber, to keep the buildings and fences in repair, and probably to erect new ones, if necessary, and to supply the farm with fuel. But the tenant could not, under such a lease cut down timber merely for the purpose of sale and profit, without reference to preparing the land for cultivation.[4]

Rules somewhat similar have been adopted on the same subject in several of the states.[5]

Where land is annexed to a furnace, cutting wood sufficient to supply the furnace has been held not to be waste.[6]

Waste in timber consists in cutting down, lopping, topping, or doing any act whereby it may be brought to decay. In England, oak, ash and elm are timber in all places, and by custom of different countries, birch, beech, walnut, willow, hornbean, blackthorn, &c.[7] In this state, pine timber has, perhaps, more frequently than any other, been protected by injunction: and it constitutes the greatest portion in bulk and value of the timber of commerce.[8]

[1] 3 Bl. Com. 223.

[2] 2 id. 281.

[3] Kidd v. Dennisson, 6 Barb. 9. Jackson v. Brownson, 7 J. R. 227.

[4] Kidd v. Dennison, 6 Barb. 10. Jackson v. Brownson, 7 J. R. 227. Cooper v. Stower, 9 id. 333. Mooers v. Waite, 8 Wend. 107.

[5] Waterman's note, Eden on Injunc. 179.

[6] Den v. Kinney, 2 South. 552.

[7] Eden on Inj. ch. 3.

[8] Watson v. Hunter, 5 J. Ch. R. 169; where injunction was granted to restrain the cutting of pine timber. Ensign v. Colburn, 11 Paige, 503: the timber in controversy was pine timber.

The cutting of many sorts of trees, which are not otherwise timber, may be waste; as if they be planted or be preserved for the support of a bank, or as a shelter for a house, and the like, or fruit trees in a garden, or trees planted or preserved for ornament.[1]

In general, courts of equity only interfere to prevent future waste, and not to control the disposition of that already cut, before an injunction was applied for.[2] But an injunction was allowed to restrain the removal of timber already cut, on the application of the mortgagee against the mortgagor, in a case where the latter had been decreed a bankrupt, and the timber constituted the principal value of the premises, and was cut by the mortgagor in an unconscientious manner, and with a view of defrauding the mortgagee out of his security. In that case, too, the mortgagor had no longer any interest in the mortgaged premises, nor any hope of paying the debt.[3]

It is not waste in a tenant for life to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds for such repairs, provided this be proved to be the most economical mode of making the repairs.[4] Every tenant for life, unless restrained by covenant, has a right to *house-bote*, *fire-bote*, *plough-bote*, and *fence-bote*. This is a right to take from the premises such wood as is necessary for fuel, for fences, and for agricultural erections.[5]

It may in general be said that waste, which ensues from the act of God, is *excusable*. Thus, if a house fall by a tempest, or be abated by lightning; if apple trees be torn up by a great wind, and the lessee afterwards cuts them up; if the banks of a river be well repaired by the lessee, and the water notwithstanding subvert them, and surround the meadow, by which it has become rushy; in these, and the like cases, it is not waste in the tenant.[6]

At common law, a tenant for life, *without impeachment of waste*, was treated like the owner of the estate, except as to the duration of his estate. He might pull up, or cut down wood and timber, or dig mines, &c. at his pleasure.[7] But whatever effect this clause in a lease may have in an action at law to recover the place wasted, or damages, or both, courts of equity will restrain the tenant from doing any act destructive of the

[1] Coke Litt. 53, a. Hob. 219.
[2] Watson v. Hunter, 5 J. Ch. R. 169.
[3] Ensign v. Colburn, 11 Paige, 504.
[4] Loomis v. Wilbur, 5 Mason, 13. Bac. Ab. Waste, F. contra.
[5] Coke Litt. 416.
[6] Bac. Ab. Waste, F.
[7] Id. N.

estate granted, and from cutting down trees planted for ornament or shelter, and from destroying the house itself.[1]

With regard to what shall be deemed ornamental, it seems to be settled that it is not the taste of the court, or of the tenant for life, that is to control. If the testator or author of the interest by deed had *gratified his own taste* by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between the parties the court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them, and it is not competent to them to substitute another species of ornament for that which the testator designed.[2]

It is not enough, therefore, in an application for an injunction, in cases of that kind, to allege that the trees cut down were ornamental. It must be shown that they were planted, or left standing, for the purpose of ornament.[3]

The principle has been extended from ornament of the house, to out-houses and grounds, then to plantations, vistas, avenues, and all the rides about the estate for ten miles round; and in the case of the Marquis of Downshire v. Sandys, (supra,) it was held to extend to clumps of firs on a common, two miles distant from the house, they having been planted for ornament.[4]

The principle has been extended to granting an injunction against cutting trees which were planted to exclude objects from view.[5]

The species of waste we are considering is denominated *equitable waste.* It is so called because it is restrained only by courts of equity, and is not punishable in courts of law.

The clause in leases, which give rise to these decisions, is not usually inserted in leases in this state.

Though a tenant for life may open the earth in new places, in pursuit of an old vein of coals, where the coal mines had been opened before he came to the estate,[6] yet he has no power to open new mines, such as had not before been opened.[7] The same rule was applied by the courts of New-York to mines of iron ore.[8]

[1] Vane v. Lord Bernard, 2 Vern. 733. Parkington's case, 3 Atk. 215.

[2] Marquis of Downshire v. Lady Sandys, 6 Ves. 110.

[3] Coffin v. Coffin, Jacob, 70.

[4] Ld. Tamworth v. Ld. Ferris, 6 Ves. 419.

[5] Day v. Merry, 16 Ves. 375. Williams v. M'Namara, 8 id. 70. Newdegate v. Newdegate, 1 Sim. 131.

[6] Clavering v. Clavering, 2 P. Wms. 389.

[7] Whitfied v. Bewit, 2 P. Wms. 240.

[8] Coates v. Cheever, 1 Cowen, 477

In Saunders' case[1] many points were decided on this subject. Thus it was held, that if a man hath land, in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig in it; for inasmuch as the mine is open at the time, &c. and he leases all the land, it shall be intended that his interest is as general as his lease is; viz. that he shall take the profit of all the land, and by consequence of the mine in it. If, however, the mine were not open, but included within the bowels of the earth at the time of the lease made, in such case, by leasing of the land, the lessee cannot make new mines, for that shall be waste.

If a man hath mines hid within his land, and leases his land, *and all mines therein*, there the lessee may dig for them, for *quando aliquis aliquid concedit, concedere videtur et id sine quo res ipsa esse non potest.*

Courts of equity are, in general, reluctant in granting injunctions restraining mining operations, from the great expenditures required to renew operations after they have been suspended; and they will refuse to interfere, if the plaintiff has been guilty of *laches*.[2]

Any material change in the nature and character of the buildings, made by the tenant, is waste, although the value of the property should be enhanced by the alteration.[3] In one case, the court say that a tenant cannot, under the pretense of advantage to the reversioner, change the nature of the buildings; and many cases show that such changes, though beneficial, would be waste.[4] The ground on which alterations in the demised premises, not prejudicial to the value of the property, have been declared to be waste, is, that they change the identity of the estate. Accordingly, the conversion of arable land into wood, or of meadow into arable, provided it be ancient pasture, is waste; and injunctions have been granted in all times to prevent it.[5] So, converting a meadow into an orchard, or ploughing up a hop ground and sowing it with grain, is waste. The conversion of one building into another, as the changing a logwood mill into a cotton mill, is waste.[6] So, it has formerly been held, that if the lessee pulls down the house and builds a new one, it is waste. if the new one is either larger or smaller than the one demised.[7] So, the making material alterations in a dwelling house is waste.[8]

[1] 5 Coke, 22.

[2] Grew v. The Duke of Northumberland, 17 Ves. 284. 13 id. 236. Birmingham Canal Co. v. Lloyd, 18 id. 515.

[3] Kidd v. Dennison, 6 Barb. 13, per Paige, J.

[4] Jackson v. Andrews, 18 J. R. 434.

[5] Wilton v. Saxon, 6 Ves. 106.

[6] Bridges v. Kilburn, cited 5 id. 691.

[7] 22 Vin. Ab. 439.

[8] Douglass v. Wiggins, 1 J. Ch. R. 435.

But the doctrine of some of these cases is not applicable to the state of agriculture in this country. If applied literally, they would put a stop to all improvements in husbandry, and prevent the growth and expansion of the country. In speaking on this subject Chancellor Walworth said: Some of the ancient cases restricted the tenant within very narrow limits, as to his right to alter or improve the premises held by him, without subjecting him to an action of waste, or to a forfeiture of the estate. It was for a time questionable whether a tenant or a copyholder could erect a new building upon the premises, without subjecting himself to a loss of the property. (See Ward's case, 4 Leon. 241. Gray v. Ulysses, 2 Dyer, 211, note b. Paston v. Utberts, Litt. R. 264; Hutton, 102, S. C. Cecil v. Cave, D'Anver's Abr. 194. 2 Rolle's Abr. 815. Coke Litt. 53, a. Keilway, 38. Darcy v. Askwith, Hobart's R. 234.) But whatever doubts may have formerly been entertained on this subject, he had no hesitation in saying, that by the law of this state, as now understood, it is not waste for the tenant to erect a new edifice upon the demised premises; provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. He admitted that the tenant has no right to pull down valuable buildings, or to make improvements or alterations, which would materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. But to apply the ancient doctrines of waste to modern tenancies, even for short terms, would, he thought, in some of the cities and villages, put an entire stop to the progress of improvement, and deprive the tenant of those benefits which both parties contemplated, at the time of the demise, without any possible advantage to the owner of the reversion. The modern cases as to the right of the tenant to remove fixtures, or even some kinds of buildings, erected for the purposes of trade or manufacture, show the change which has gradually, if not imperceptibly, taken place in the law upon this subject. And upon the principles of these modern cases, it cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was at the commencement of the tenancy; and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion for the expenses of their removal. On these principles, when the lessee of a house and lot, in the city of New-York, for eight years, on one end of which was a house and lot containing a druggist store, commenced erecting a brick building on the rear of the lot, which

was vacant, for a livery stable, the chancellor refused the application of the landlord for an injunction.[1]

Waste may be done by the act of the tenant in pulling down houses, or by his neglect to repair them. But if the house be uncovered when the tenant comes in, it is no waste in the tenant to suffer it to fall down The same rule applies to glass windows, wainscots, doors, furnaces, and the like; these being parcel of the house, it is waste if they are suffered to be broken, &c.[2]

As the material alteration of the premises demised, from their natural condition, is, under many circumstances, waste, so also is the removal of things annexed to the freehold by the tenant.

The term *fixtures* is always applied to articles of a personal nature which have been affixed to land. It is sometimes used to denote the mere fact of annexation, and that the things so annexed cannot be removed; and at other times, to designate those personal chattels which have been annexed to the land by the tenant, and which he, or his representatives, may sever and remove without the consent of the owner of the freehold.

It is not enough, to constitute a fixture, that the article should be merely laid upon the land. Something more than mere juxta-position is required; as that the chattel has been let into the soil, or fastened to some fabric previously attached to the ground, in such way that it cannot be detached without some injury thereto.

It is a very ancient maxim, that whatever is fixed or annexed to the realty is thereby made a part of the realty to which it adheres, and partakes of its incidents and properties. By the mere act of annexation a personal chattel immediately becomes parcel of the freehold itself.[3]

Land includes not only the ground or soil, but every thing attached to it above or below, whether by the course of nature, as trees, herbage, mines and water, or by the hands of man, as houses.[4] Many articles, though originally goods and chattels, yet when affixed by a tenant to his freehold, cease to be goods and chattels, by becoming part of the freehold; and though it is in his power to reduce them to a state of goods and chattels again by severing them during his term, yet, until they are severed, they are a part of the freehold, as wainscots screwed to the wall,

[1] Winchip v. Pitts, 3 Paige, 259.
[2] Coke Litt. 53, a.
[3] Ferard's Law of Fixtures, ch. 1.
[4] Hilliard on Real Property, ch. 1, § 8.

trees in a nursery ground, which when severed are chattels, but standing are part of the freehold; certain grates, and the like.[1]

The ancient rule was, that all annexations made by the tenant during the term became part of the freehold, and could not be severed without the consent of the landlord.[2] But the strictness of the ancient rule has been greatly relaxed in modern times.[3]

The doctrine of the court of kings bench, in Elwes v. Maw, has been adopted in New-York. Thus, in a case arising before the late revision of the statutes, and decided in 1827,[4] the court, adopting the language of Lord Ellenborough, in Elwes v. Maw, say, that the law relative to fixtures arises principally between three classes of persons: 1st, between the heir and executor; 2d, between the executors of tenant for life and the remainderman and reversioner; and 3d, between landlord and tenant: and observe, that in the first case the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider, as a personal chattel, any thing which has been affixed thereto. In the latter cases, the reasons for relaxing the rule are obvious, upon motives of public policy. The tenant is thereby encouraged to make improvements, and the interest of trade promoted, while the landlord or reversioner has no cause to complain, inasmuch as the farm is restored to him in the same state as when he parted with it. A different rule would effectually check all improvements by the tenant, when it is known that, at the end of the term, they are to be surrendered to the landlord, or the reversioner of tenant for life. But the case between heir and executor, and vendor and vendee, is widely different. The ancestor or vendor has the absolute control, not only of the land, but of the improvements. The heir and executor are both representatives of the ancestor; the vendor has an election to sell or not to sell the inheritance. The court accordingly decided that, as between the vendor and vendee, all fixtures pass to the latter, though they were erected for the purpose of trade or manufactures.

The rule between the executors of tenant for life, and the remainderman and reversioner, with regard to the right to fixtures, is more favorable to the executors than in the case of heir and executor, and vendor and vendee. An illustration of the rule will be found in an early case, before Lord Hardwicke, in which it was held that a fire engine, set up for the

[1] Per Gibbs, Ch. J., in Lee v. Risdon, 7 Taunt. 88.

[2] Coke Litt. 53, a. Herlakenden's case 4 Coke, 62.

[3] Elwes v. Maw, 3 East, 38. Walker v. Sherman, 20 Wend. 636.

[4] Miller v. Plumb, 6 Cowen, 667.

benefit of a colliery by a tenant for life, should be considered a part of his personal estate, and go to his executors, and not belong to the owner of the inheritance.[1]

The rule between landlord and tenant is more favorable to the latter, with respect to the right of removal, than in either of the other cases. A case in our own courts, decided before the late revision of the statutes, will afford a convenient illustration. A cider mill and press, erected by a tenant holding from year to year, at his own expense, and for his own use, in making the cider on the farm, were held not to be fixtures, but personal property, belonging to the tenant, who might remove them at the expiration of his tenancy.[2] In a case of this kind, it does not seem to be important, whether the mill be let into the ground or not. Nor will the *title* to it be affected, by its not being removed during the continuance of the tenancy; though the tenant, if he enters and removes it after the termination of his tenancy, may be a *trespasser* on the soil, and be answerable for breaking the close, there can be no recovery against him for the value of the mill.[3]

In the Revised Statutes, an attempt was made to put the title of an executor or administrator to things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support, upon the same footing as that of the tenant, as between him and his landlord.[4] It declared such annexations assets in the hands of the personal representatives, to be applied and distributed as part of the personal estate of the testator or intestate, while it left other annexations to the freehold, to descend with it to the heirs, or pass to the devisees.[5] But this provision of the Revised Statutes has not been thought sufficient to define what is to be considered a part of the freehold itself, and what are mere fixtures or things annexed to the freehold, for the purposes of trade or manufactures. And it was deemed still necessary to go back to the common law, and to the decisions of the courts, for the purpose of ascertaining what is a substantial part of the freehold, and what is a mere fixture or thing annexed to such freehold. We must also resort to the same sources of information to ascertain what is to be considered a part of a building, and what is in its nature mere personal property, and only annexed to such building temporarily, for the purpose of trade or manufacture. And the chancellor accordingly held, notwithstanding the statute, that the water wheels,

[1] Lawton v. Lawton, 3 Atk. 13.
[2] Holmes v. Tremper, 20 J. R. 29.
[3] Id.
[4] 2 R. S. 83, sub. 4. 3 R. S. 639, revisers' notes.
[5] 2 id. 82, 83, §§ 6, 7, 8.

mills stones, running geer and bolting apparatus of a grist and flouring mill, and other fixtures of the same character, are constituent parts of the mill, and descend to the heirs at law as real property; and do not pass to the executors or administrators of the deceased owner of the mill as a part of his personal estate, although they were not so fixed into the wall as to be essential for its support.[1] It would seem that fixtures of this character, which are essential to the enjoyment of the inheritance, are as much a part of the freehold as the building and water power, which with them constitute the mill.[2]

It is obviously not the purpose of this treatise to discuss the law of fixtures at large.[3] It is not waste for the tenant to sever from the freehold such annexations as the law does not consider as indissolubly a part of the inheritance, and he therefore cannot be restrained by injunction for doing, or threatning to do, what the law allows him to perform.

Having thus considered, in a general way, what constitutes waste, it will be convenient, in the next place, to consider the remedy, and between what parties a court of equity will interpose.[4]

All the ancient remedies for the prevention of waste have, in modern times, given place either to an action on the case, or to a bill in equity to stay *waste* either threatened, or while the party is committing it, and for an *account* of such waste as may have already been done. The latter remedy is the one which falls within the compass of this treatise, and is open to many persons who could not take the advantage of the ancient legal remedies. It is not defeated by the existence of an intermediate estate, between the parties to the action; and will be sustained, where the rights of the complaining party are only of an equitable nature.

The action of waste is abolished by the code, but the wrongs remediable by that action are, like other wrongs, the subject of action, in which there may be judgment for damages, forfeiture of the estate of the offending party, and eviction from the premises.[5] The remedy in equity is unaffected by the code, except it must be conducted according to the forms of the code. There are also statutory remedies for staying waste, pending an action by an order of the same court.[6]

[1] House v. House, 10 Paige, 158, 163, 164.

[2] Id.

[3] See Walker v. Sherman, 20 Wend. 638 to 657, for an elaborate review of all the cases on this subject, by Cowen, judge.

[4] For an account of the remedy at common law, see 3 Bl. Com. 227, 228. Jefferson v. Bishop of Durham, 1 Bos. & Pul. 120, opinion of Eyre, Ch. J. Eden on Inj. ch. 9. 1 Fonb. Eq. B. 1, ch. 1, § 5, note.

[5] Code, § 451. 2 R. S. 333.

[6] 2 R. S. 336, § 18.

At law a mortgagee cannot maintain an action of waste, against the mortgagor, before the forfeiture of the mortgage. The reason is, that waste is a remedy given to him who has the inheritance in expectancy in remainder or reversion. The interest of the mortgagee is contingent, and may be defeated by payment of the money secured by the mortgage.[1] But in equity an injunction lies against a mortgagor in possession, to stay waste. The court will not suffer him to prejudice the security.[2] For every substantial purpose, the mortgagor is, in this state, the real owner of the land, and the mortgagee has merely a lien upon it.[3] Though in general the owner of the legal estate can deal with it as he pleases, yet if there be equitable circumstances, incompatible with that right, equity will restrain him.[4] Lord Hardwicke said, in one case,[5] that he should have no scruple to grant an injunction to stay waste in favor of a child *in ventre sa mere*. An action at law would not lie in such a case; and there are various other contingent rights, not cognizable at law, which equity will protect.

At common law the assignee of the tenant by the curtesy could not be used in waste. The action must be brought against the tenant himself by the heir; and the books state, that thereby he shall recover the lands against the assignee for the privity which is between the heir and tenant by the curtesy. So if tenant in dower, or tenant by the curtesy, grant over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment; but if the heir grants over the reversion, there the privity of action is destroyed, and the grantee cannot have any action of waste but only against the assignee; for between them there is privity in estate; and between them and the tenant in dower, or the tenant by the curtesy, is no privity at all; so that at law, if the assignee is suable in waste, there must be a privity of estate.[6]

The action of waste could not be maintained against a tenant for life, except by him who had the immediate estate of inheritance, expectant on the determination of the estate for life. So that if, between the estate of the tenant for life, who commits waste, and the subsequent estate of inheritance, there was interposed an estate of freehold, to any person *in*

[1] Peterson v. Clark, 15 J. R. 205. 3 Bl. Com. 225.

[2] Brady v. Waldron, 2 J. Ch. R. 148. Robinson v. Litton, 3 Bl. 210. Downing v. Palmateer, 1 Monroe, 65. Spear v. Cutler, 5 Barb. 489. Van Wyck v. Alliger, 6 id. 507.

[3] Astor v. Milles, 2 Paige, 68. Astor v. Hoyt, 5 Wend. 602.

[4] Robinson v. Liston, 3 Atk. 210.

[5] Id.

[6] Bates v. Schraeder, 13 J. R. 263. Coke's Inst. 54, a. 2 id. 301, a. Walker's case, 5 Coke. 23.

esse, during the continuance of such interposed estate, the action of waste was suspended.[1] Nor could any person at common law, unless he was in the actual possession of the land, maintain trespass for an injury to the inheritance.[2] The act for the amendment of the law provided for both these cases,[3] and which is preserved by the Revised Statutes.[4] It is there enacted that a person seised of an estate in remainder, or reversion, may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. This provision merely relieved the plaintiff from the technical objections above mentioned. It gives to the remainderman or reversioner an action of waste, when waste is the appropriate remedy, and trespass, when trespass is the appropriate remedy, notwithstanding any intervening estate for life or years.[5] It does not give the action of waste against a stranger nor alter the law as to the requisite privity of estate between the heir and the tenant by the curtesy or tenant in dower, so that the principle continues the same as to his assignee, who, without such privity, is not liable at law to an action of waste.[6]

An injunction to stay waste between tenants in common will be sustained in special cases; as where the defendant is insolvent, or where the waste is destructive of the estate, and not within the usual and legitimate exercise of enjoyment; or where one tenant in common occupies as tenant under another.[7] The statute of W. 2, 13 Ewd. 1, ch. 22, and which has been adopted in this state,[8] gives an action of waste by one tenant in common or joint tenant against another. The injury is, therefore, one recognized by law; and the remedial power of equity may be called in, whenever the legal remedy is inadequate or defective.

In all cases after the commencement of an action for the recovery of land, or for the recovery of the possession of land, if the defendant shall commit waste, the court in which the suit is pending is empowered, on the application of the plaintiff, to make an order restraining the defendant from the commission of any further waste thereon, and to enforce the order as courts of equity enforce an injunction.[9]

[1] Livingston v. Haywood, 11 J. R. 430, 431.

[2] Id.

[3] 1 R. L. 527, § 33.

[4] 1 R. S. 750, § 8.

[5] Bates v. Schraeder, 13 J. R. 263. Livingston v. Haywood, 11 id. 431.

[6] Id.

[7] Hawley v. Clowes, 2 J. Ch. R. 122. Hole v. Thomas, 7 Ves. 588.

[8] 2 R. S. 334, § 3.

[9] Id. 336, §§ 18, 19. And see former act, 1 R. L. 88, § 39. 6 Edw. 1, ch. 13.

A summary jurisdiction is also vested by law, in justices of the supreme court and county judges, or any one of them, to restrain by an order the commission of waste, committed or threatened, by the person whose real property has been sold on execution, or by any person in possession of the premises so sold, between the sale and time of redemption, and to punish the violation of such order in the same manner as courts of equity punish the violation of an injunction.[1]

The jurisdiction of courts of equity to restrain waste is a wholesome one, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court. Equity goes to greater length in staying waste than courts of law. There are numerous cases in chancery, in which the court has interposed to stay waste by the tenant, where no action could be maintained against him at law. Thus, where there is lessee for life, remainder for life, remainder in fee; the mesne remainderman cannot bring waste, nor the remainderman in fee, but equity will interpose and stay waste.[2] So equity will in many cases restrain waste, though the lease contain the clause, *without impeachment of waste*, and which takes away the remedy at law, as where this power is exercised in an unreasonable manner and against conscience.[3] Nor is it essential to the remedy that there should be an actual *lis pendens* in a court of law.[4]

The remedies against the *person* are less efficient than they were formerly; while the progress of society, the increase of wealth, and the competition to which it gives rise, call for and receive the more energetic protection of the law. The courts of equity have accordingly yielded to the pressure of public necessity, and, as was remarked by Vice Chancellor Bruce, on a recent occasion, do not treat questions of destructive damage to property now, exactly as they did forty years back—that their protection in such respects is more largely afforded than it then generally was. And in adverting to cases where relief by injunction had formerly been denied, he ventures to say that relief would be given, at the present day, in cases of an analogous character.[5]

Cases of trespass upon land, attended with irreparable injury, are analogous to waste, and in modern times, and with certain limitations, injunc-

[1] 2 R. S. 337, § 23 et seq.

[2] Kane v. Vanderburgh, 1 J. Ch. R. 12. Perrot v. Perrot, 3 Atk. 94. Robinson v. Litton, id. 210. Farrant v. Lovel, id. 723.

[3] Id. Aston v. Aston, 1 Ves. 264. Strathmore v. Bowes, 2 Bro. 88.

[4] Kane v. Vanderburgh, 1 J. Ch. R. 11

[5] Haigh v. Jaggar, 2 Collyer, 236.

tions have been granted. Lord Eldon said, on one occasion,[1] that there was no instance of an injunction in trespass till the case before Lord Thurlow, in Fleming's case, cited and followed by himself,[2] where the defendant had worked from his own land into the coal mine of the plaintiff. It went upon the principle that irremediable mischief and ruin of the property, *as a mine*, would be the consequences, if the party was not stopped. On the same ground, the injunction is granted against diverting a water course from a mill, (1 Bro. 588;) against the destruction of timber, (10 Ves. 290;) against the taking of stones of peculiar value,[3] or stones from a quarry.[4] But all these are cases of great and irremediable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed. This doctrine was approved by Chancellor Kent, who refused an injunction to restrain a trespass, where the injury was not irreparable and destructive to the plaintiff's estate, but was susceptible of perfect pecuniary compensation, and for which the party might obtain adequate satisfaction in the ordinary course of law.[5]

In Fleming's case, (supra,) which Lord Eldon says was the first instance of granting an injunction in trespass, the nature of the injury was very near waste, and there was no dispute whatever about the right.[6] The ancient doctrine of the court no doubt was, not to interfere by injunction in cases of trespass, but to leave the party to his legal remedy. But the practice of the court is now more liberal; yet, in cases of trespass, it expects a strong case of destruction or irreparable mischief to be presented.[7] While, for a mere naked trespass, when the remedy at law is full and adequate, equity will not interpose; yet, for the purpose of quieting a possession, or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened, in relation either to mines, quarries, or woodland, the court will interfere by injunction, even against a person acting under a claim of right.[8] The injury may be irreparable, either from the nature of the injury itself, or from the want of responsibility in the person committing it.[9]

When the right of a party is doubtful, the court will not grant an injunction, to prevent an illegal interference with the same, until the right

[1] Smith v. Collyer, 8 Ves. 90.

[2] Mitchell v. Dors, 6 id. 147. Hanson v. Gardiner, 7 id. 308.

[3] Earl Cowper v. Baker, 17 id. 128.

[4] Thomas v. Oakly, 18 id. 184.

[5] Jerome v. Ross, 7 J. Ch. R. 315.

[6] Smith v. Collyer, 8 Ves. 90.

[7] West v. Walker, 2 Green's Ch. R. 279. Van Winkle v. Curtis, id. 422.

[8] Kerlin v. West, 3 Green's Ch. R. 448

is established at law.[1] To warrant an injunction, to prevent a mere trespass, the party invoking the aid of the court must have been in the previous undisturbed enjoyment of the property, under claim of right, or relief at law must be unattainable, from the irresponsibility of the defendant or otherwise.[2]

It requires a strong case to restrain a trespass by a party in possession, claiming by an adverse title. Unless a complaint shows some other ground of equitable relief, such as the insolvency of the defendant, the peculiar nature of the injury, and the like, accompanied with proof of the plaintiff's title, equity will not interfere till the right has been established at law. If it admits the defendant's possession under claim of right, and does not countervail it by some other statement, the complaint is defective.[3]

SECTION VI.

OF INJUNCTIONS TO RESTRAIN THE INFRINGEMENT OF PATENTS, THE VIOLATION OF COPYRIGHTS, AND THE UNAUTHORIZED PUBLICATION OF LETTERS, AND THE LIKE.

ANOTHER ground of injunction is to restrain the infringement of patents and of copyrights. By the constitution of the United States, congress is empowered to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.[4] And by a subsequent article, (art. 3, § 2,) the judicial power of the general government is, amongst other things, made to extend to all cases in law and equity, arising under the constitution and the laws of the United States. Congress has exercised its power, both with respect to authors and inventors, by securing to them, for limited periods, the product of their genius and labors. And by the act of the fifteenth of February, 1819, entitled an act to extend the jurisdiction of the circuit courts of the United States to cases arising under the law relating to patents, original cognizance, as well in law as

[1] Hart v. Mayor of Albany, 3 Paige, 213. Nevitt v. Gillespie, 1 How. (Miss.) 108. Partridge v. Menck, 2 Barb. Ch. R. 104. Van Bergen v. Van Bergen, 3 J. Ch. R. 282. Dana v. Valentine, 5 Metcalf, 8.

[2] Hart v. Mayor of Albany, 3 Paige, 214. Storm v. Mann, 4 J. Ch. R. 21.

[3] Pillsworth v. Hopton, 6 Ves. 51. Davenport v. Davenport, 7 Hare, 222. Storm v. Mann, 4 J. Ch. R. 22.

[4] Const. U. S. art. 1, § 8, subd. 8.

in equity, is given to the circuit courts of the United States, of all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions and discoveries; and authority is conferred on said courts, upon any bill in equity, filed by any party aggrieved in any such cases, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said courts may deem reasonable, subject to appeal to the supreme court of the United States.[1] And by the act of July 4, 1836, entitled an act to promote the progress of useful arts, and to repeal all acts and parts of acts heretofore made for that purpose, it is enacted, that all actions, suits, controversies and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court of the United States having the powers and jurisdiction of a circuit court. And it then confers, in express terms, upon those courts, the power of granting injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor, secured to him by any laws of the United States, on such terms and conditions as said courts may deem reasonable, with a right of appeal to the supreme court of the United States.[2]

Under the foregoing constitutional and legislative provisions, it has been held, by the court of appeals of the state of New-York, that the jurisdiction in the case of infringements of patents is exclusively in the courts of the United States, and that the courts of this state have no jurisdiction to entertain a suit instituted to restrain the infringement of a patent right.[3] Under previous acts of congress, the supreme court of this state disclaimed jurisdiction in actions brought to recover damages for the infringement of patents.[4] Chancellor Walworth held, in 1830, that the act of 15th February, 1819, extending jurisdiction of the circuit courts of the United States to suits both at law and in equity, arising under the patent laws, did not, in terms, or by implication, render that jurisdiction exclusive.[5] But he admitted, in a subsequent case, that the jurisdiction is exclusive, under the revised act of 1836.[6]

The reasoning of the learned judge, in the case of Dudley v. Mayhew,

[1] Laws of U. S. 6th vol. 369.
[2] Laws of 1836, p. 242, § 17.
[3] Dudley v. Mayhew, 3 Comst. 9.
[4] Parsons v. Barnard, 7 J. R. 144.
[5] Burrall v. Jewett, 2 Paige, 134, 145
[6] Gibson v. Woodworth, 8 id. 132.

(supra,) in the New-York court of appeals, tends to show that the jurisdiction, with respect to literary works and mechanical inventions, stands upon the same ground. Neither the author or inventor has any right which can be protected otherwise than through the instrumentality of the acts of congress. And when a statute confers a right, and prescribes adequate means for protecting it, the proprietor is confined to the statutory remedy. In the case of authors and inventors, the remedies given by the statute are fully adequate for the protection of the rights created, and the courts designated, competent to declare and enforce them. It is believed that the jurisdiction to restrain by injunction the infringement of a patent, or the invasion of a copyright, is exclusive in the courts of the United States, and cannot be exercised concurrently by the state courts.

It is foreign to the design of this work to go into the discussion of questions relative to patents and copyrights. The whole subject is exhausted in Eden on Injunctions, to which Mr. Waterman has appended the American cases. Whoever wishes to learn how those rights are protected and enforced, and to observe the subtle principles on which many of the cases turned, will find the whole subject admirably discussed in the author to which reference is made.[1]

Of a nature similar to the violation of a copyright is the publication, without the consent of the author or legal owner, of any manuscript whatever, whether it be a manuscript treatise, or letters written by or to him, either of business or friendship, or on any other occasion. The ground for an injunction, in these cases, rests on the *property* which the complaining party has in the manuscripts or letters, or on the *trust and confidence* reposed in the other party, and which will be violated by the unauthorized publication.

The act of congress, to amend the several acts respecting copyrights, passed February 3, 1831,[2] enacts that any person or persons, who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer, and pay to the author or proprietor all damages occasioned by such

[1] 2 Eden on Injunctions by Waterman, 277 to 337, ch. 12, 13. Curtis on Copyright. Campbell v. Scott, 11 Sim. 31. Emerson v. Davis, 3 Story's R. 768. Folsom v. Marsh, 2 id. 100. Gray v. Russell, 1 id. 11. Bramwell v. Holcomb, 3 Myl. & Craig, 737, 738. Saunders v. Smith, 3 id. 711

[2] Laws of 1831, p. 11, ch. 15, § 9.

injury, to be recovered by a special action on the case, founded upon that act, in any court having cognizance thereof; and it empowers the several courts of the United States, having authority to grant injunctions to prevent the violation of the rights of authors and inventors, to grant injunctions, in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid. Here, no exclusive jurisdiction is given to the courts of the United States, and it is quite apparent that the state courts have the same jurisdiction, in this respect, as existed at common law.

If the letters or manuscripts be of a *literary character*, the jurisdiction of a court of equity to restrain their publication, by injunction, does not seem to have been doubted. Lord Hardwicke, in an early case, granted an injunction restraining the defendant from publishing the letters of the plaintiff, Pope, but not those which were written to him. He considered that the writing a letter to a man, and sending it to him, does not give to the receiver a right to publish it. The latter may possibly own the paper on which it is written, and have a special property in the letter itself. But he thought the right to obtain a copyright for the letter remained in the writer, notwithstanding its transmission to the party addressed, and that neither the latter, or any other person, had a right to publish it without the consent of the writer.[1] This case was followed by Lord Bathurst, in 1773, and an injunction was granted on a bill filed by the executors of Lord Chesterfield, to restrain the publication of letters written by his lordship in his lifetime, to his son in the lifetime of the latter, and the injunction was granted against the widow and personal representative of the son and the publisher.[2] In a modern case, the vice chancellor held, that an injunction, restraining the publication of private letters, having the character of literary compositions, whether of a private nature, or upon general subjects, stood upon the same foundation as the protection of literary property.[3] He thought that mercantile or other correspondence stood upon a different footing, and whether the publication should be restrained or not, depended upon circumstances. And that if the publication became necessary for the vindication of the party receiving the letters, against any unjust aspersion cast upon him by the writer of the letters, the publication of them would not be enjoined by a court of equity.[4]

The decision of the vice chancellor of the first district, in an important

[1] Pope v. Curl, 2 Atk. 342.
[2] Ambler, 737.
[3] Percival v. Phipps, 2 Ves. & B. 23.
[4] Id. 27.

case before him, disclaimed for the court of chancery all jurisdiction to restrain the publication of private letters, whether written in the confidence of friendship or otherwise, except upon the ground of *literary property*.[1] Accordingly, though the publication might wound the feelings of the writer, and be a breach of confidence reposed in the party to whom they were addressed, yet if the letters contained no attribute of literary composition, an injunction should be refused. And there is a dictum of the chancellor, in another case,[2] that the utmost extent to which the court of chancery has ever gone in restraining any publication by injunction has been upon the principle of protecting the rights of property. And he doubts whether Lord Eldon, in Gee v. Pritchard,[3] in assuming to restrain a publication of letters as a matter of property merely when in fact the object of the complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only, did not intrench upon the liberty of the press. The chancellor, in a still more recent case, reviewed the whole subject, and concluded by saying that the court of chancery cannot properly exercise a power to restrain the publication of private letters, on the ground of protecting literary property, where they possessed no attributes of literary composition.[4] In Hoyt v. Mackenzie, the bill charged *no breach of confidence* in any person, but rested the case upon the violation of the right of property of the complainant in the letters. In Brandreth v. Lance, the object of the bill was to prevent the publication of a libel upon the plaintiff or his business, which the chancellor refused to sustain. The ground of the reluctance of the court, to entertain bills for an injunction in these cases, is the apprehension that it will lead to an infringement of the liberty of the press.[5]

If the question turns upon the right of property which the writer has in a letter which he has addressed and sent to another person, it is difficult to see the principle on which the court can, as matter of law, say that the writer has a property in one class of letters, because they are *literary compositions*, and none in another class, because they have no *literary merit*. How can the court decide the literary excellence of the letters? How can it know that the one is worthy of publication by the writer, and that its publication by the person addressed should therefore

[1] Wetmore v. Scovell, 3 Edw. Ch. R. 515.

[2] Brandreth v. Lance, 8 Paige, 27.

[3] 2 Swanst. Rep. 403.

[4] Hoyt v. Mackenzie 3 Barb. Ch. R. 323.

[5] Brandreth v. Lance, 8 Paige, 28.

be restrained, while another is destitute of merit, and therefore the court should not interfere? Would not the right to decide these questions, if conceded, leave one class of letters without protection, and that class the one which most impressively called for it? On principle, it would seem, that if the writer has a *property* in a letter written like a *scholar*, he has a property in a letter written like a *tyro*. It is not the business of the court to inquire which letter will command the highest price among publishers. It is enough that it is the *property* of the writer, and he alone must decide whether it shall be published or not. The writer of a poor letter is as much entitled to have his property protected, as the writer of a good one. Indeed, in the former case, the unauthorized publication may be more distressing and injurious to the writer than in the latter.[1]

But though the *right of property* is enough to lay the foundation for an injunction to restrain the unauthorized publication of another's manuscripts or letters, still it is believed that, where the publication involves a breach of *trust and confidence*, a court of equity may, on that ground alone, interfere.[2] An injunction was granted to restrain the publication of letters from an old lady, under a weak attachment to a young man, there having been an agreement not to publish the letters, but to deliver them up for a valuable consideration, and a sum of money having been actually paid to the defendant.[3]

SECTION VII.

OF INJUNCTIONS TO SUPPRESS THE CONTINUANCE OF PUBLIC OR PRIVATE NUISANCES, PURPRESTURES, AND THE LIKE.

ANOTHER ground for an injunction, is to restrain the continuance of public or private nuisances, purprestures, and the like. The term *nuisance* is not confined to such erections or employments as are prejudicial to health, but embraces every thing that incommodes and offends, and renders the enjoyment of life and property uncomfortable.[4] It is of two

[1] Curtis on Copyright, 93 et seq. Story's Eq. Jurisp. §§ 945, 948. Gee v. Pritchard, 2 Swanst. R. 403.

[2] Percival v. Phipps, 2 Ves. & B. 19. Eden on Inj. 325.

[3] Id. Granard v. Dunken, 1 Ball & Beaty, 209.

[4] Aldred's case, 9 Co. 58, a. Tanner v. The Trustees of Albion village, 5 Hill, 121. Rex v. Papineau, Stra. 686. Brady v. Weeks, 3 Barb. S. C. R. 157.

kinds, *common* and *private* nuisances. The first is an offense against the public, either by doing a thing which tends to the annoyance of the public generally, or by neglecting to do a thing which the common good requires.[1] The last, is where the injury either relates to an individual or his property. For punishing or suppressing a public or common nuisance, the remedy is by indictment, at the suit of the people. No action lies by an individual for a common nuisance, except when a private person suffers some extraordinary damage, beyond the rest of the people; in which case he shall have a private satisfaction by action.[2]

Courts of equity do not restrain nuisances, except in such cases as where an action at law could be maintained. In this respect equity follows the law. Bills to restrain nuisances, said Lord Hardwicke, must extend to such only as are nuisances at law. The fears of mankind, though they may be reasonable ones, will not create a nuisance.[3] An injunction has been refused, to restrain the building of a house to inoculate for the small pox,[4] and in another case, to restrain the burning of bricks near the habitations of men.[5]

In many of the cases which are indictable, as common nuisances, courts of equity have no cognizance. The remedy at the suit of the people by a public prosecution will, in general, accomplish the object of suppressing the injury, and render unnecessary the prosecution by individuals. It may not be without use to notice some of the instances in which certain acts have been adjudged at law public nuisances.

With regard to offensive trades, it has been held that a brew-house, erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance; and so, in the like case, may a *glass-house* or *swine-yard*. With respect to a candle manufactory, it has been held that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell; but the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended that it is necessary to make them in a town.[6]

It is not necessary, to constitute a nuisance, that the smell created by it is injurious to health. If there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air. Nor

[1] Bac. Abr. title Nuisance.

[2] 3 Bl. Com. 220. Lansing v. Smith, 4 Wend. 9, per Walworth, Ch.

[3] 3 Atk. 751.

[4] Id. Baines v. Baker, Ambler, 158. Boom v. City of Utica, 2 Barb. S. C. R. 104.

[5] Duke of Grafton v. Hillard, cited 18 Ves 219.

[6] Russell on Crimes, B. 2, § 1.

will the presence of other nuisances justify any one of them. One is not the less subject to prosecution, because others are culpable. The question, with regard to that class of nuisances, is whether the business carried on is productive of smells offensive to persons passing along the public highway.[1]

Erecting gunpowder mills, or keeping gunpowder magazines near a town, is a nuisance at the common law. Disorderly inns, ale houses, bawdy houses, gaming houses, play houses, unlicensed or improperly conducted booths and stages for rope dancers, mountebanks, and the like, are public nuisances, and may be indicted.[2]

So, it seems, erections of every kind, adapted to sports or amusements, having no useful end, and notoriously fitted up and continued, in order to make a profit for the owner, are regarded by the common law as nuisances. On this principle the supreme court of New-York held, in a recent case, that a bowling alley kept for gain or hire is a public nuisance at common law, though gambling therein be expressly prohibited by its owner.[3] So, a house in a populous town, divided for poor people to inhabit during the prevalence of an infectious disease, is a nuisance.[4] Such a building, during the prevalence of the Asiatic cholera in 1832, in the city of Albany, was adjudged a public nuisance, and the party who tore it down, by order of the board of health, obtained a verdict, when sued for damages by the owner.[5] So manufactures, lawful in themselves, may become nuisances, if carried on in parts of towns where they cannot but greatly incommode the inhabitants and destroy their health.[6] So a mill for steeping sheepskins in water, near to and adjoining the highway and several dwelling houses, by which the air was corrupted, has been held to be a nuisance.[7]

Not only the party who continues a nuisance, but the party who originally began it, is responsible to the public. One who demises his property for the purpose of having it used in a way offensive to others, may himself be treated as the author of the mischief. The renting of a house for purpose of prostitution is indictable, as well as the keeping of such a house.[8]

[1] Russell on Crimes, B. 2, § 1. Rex v. Neil, 2 C. & P. 485.

[2] Russell on Crimes, vol. 1 p. 322.

[3] Tanner v. Trustees of Albion, 6 Hill, 121.

[4] Id. 128, per Cowen, J., citing 1 Roll. Abr. 139, tit. Nuisance.

[5] Meeker v. Van Rensselaer, 15 Wend. 397.

[6] Per Savage, in the above case.

[7] Rex v. Papineau, 1 Str. 686.

[8] The People v. Erwin, 4 Denio, 129. Fish v. Dodge, id. 317.

The foregoing cases are enough to illustrate the general principles by which the court is governed in these cases. The remedy by indictment is at the suit of the people, and embraces all cases of common nuisance. At common law, an assize of nuisance lay against him who committed the nuisance. But the ancient remedies long since gave way to an action on the case, or to a bill in equity. The Revised Statutes retain the writ of nuisance, with some modifications.[1] But few actions were ever brought under the statute,[2] and the writ itself was expressly abolished by the Code of Procedure, and the injuries formerly remediable by it were made subjects of action as other injuries, and a judgment for damages, or for the removal of the nuisance, or both, is prescribed.[3]

In this state, the aid of a court of equity has frequently been invoked to restrain the commission or the continuance of a nuisance, as well in behalf of the attorney general suing for the people, as of individuals to protect their own property.

In one case Chancellor Walworth held, that the occupation of a building, in the city of New-York, as a slaughter house, was *prima facie* a nuisance to the neighboring inhabitants, and might be restrained by injunction. The injunction was at first granted to prevent the erection of the building for a slaughter house, and was afterwards so modified as to permit the defendant to proceed with the erection of the building, but restraining him from using it, or permitting it to be used for that purpose. The defendant, by his answer, insisted that he intended to use the slaughter house in such a manner that it would not be a nuisance to the complainants or to the other inhabitants in the neighborhood, and on that ground applied to the vice chancellor to dissolve the injunction, which the vice chancellor refused, and his order was, on appeal, affirmed by the chancellor.[4] The doctrine of this case was approved by Paige, J. in a recent case, and was so far extended as to apply to a party whose slaughter house was, when erected, remote from the thickly settled parts of the city and incommoded no one, and in favor of a plaintiff, who, after the erection of the nuisance, built his dwelling house beside it.[5] The learned judge remarked, that as the city extends, such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens.

The principle which gives a party who builds on his own land, beside a nuisance previously erected, a right to have the nuisance abated is, that

[1] 2 R. S. 332.
[2] Brown v. Woodworth, 5 Barb. 550.
[3] Code, § 454.
[4] Catlin v. Valentine, 9 Paige, 575.
[5] Brady v. Weeks, 3 Barb. S. C. R. 159

a continuation of a nuisance is regarded as a new nuisance.[1] So where a man erected a house on his own land, so near the land of his neighbor that it overhung his neighbor's land three feet, and threw the water upon the land of the latter, it was adjudged that a subsequent feoffee of the latter could maintain an action against the feoffee of the wrongdoer, if the nuisance be not reformed after request made; but against him who did the wrong the action lies without request. And this went upon the ground that the dropping of the water was a new wrong.[2]

To justify the interposition of the court by injunction to restrain a nuisance, the plaintiff's title must be free from doubt. If his title be conceded, there is no occasion to have it established by a verdict in a court of law. Where a plaintiff has been, immemorially, in the enjoyment of a stream of water flowing through his land, and is in the actual possession, equity will restrain the obstruction or diversion of the water, or any important part of it, to the injury of the plaintiff. The diversion or obstruction of a water course is a private nuisance.[3]

The court will restrain a defendant from obstructing a public street in a city, by building a house thereon, if it produces a special injury to the plaintiff, by affecting the enjoyment of his property and the value of it.[4] Though the act be a public nuisance, still, if it work a special grievance to the plaintiff, he is entitled to the aid of the court.

Where the thing complained of is in itself a nuisance, and there is no doubt as to the plaintiff's right, the court will interfere to stay irreparable mischief, without waiting for the result of a trial.[5] But where the thing sought to be restrained is not in itself noxious, but only something which may, according to circumstances, prove to be so, the court will await the result of a trial at law, or of an issue awarded by itself.[6] Hence, in case of a dispute as to the right of the enjoyment of portions of the water of a stream, for manufacturing purposes, equity ought not to interfere by injunction unless the right of the complainant is capable of clear ascertainment; and then, only, to prevent irreparable mischief.[7]

An injunction lies to protect an individual or corporation in the enjoy-

[1] Per Paige, in Brady v. Weeks, 3 Barb. S. C. R. 160.

[2] Penruddock's case, 5 Co. 101. Blunt v. Aiken, 15 Wend. 524. Westbourn v. Mordant, Cro. Eliz. 191. Stapple v. Story, 10 Mass. 74.

[3] Gardner v. Village of Newburgh, 2 J. Ch. R. 164. Gifford v. Reid, Hopk. 416.

[4] Corning v. Lowrie, 6 J. Ch. R. 439.

[5] Mohawk Bridge Co. v. U. & S. Rai. road, 6 Paige, 554, 563.

[6] Id. The Hudson and D. Canal Co. v. Erie Railroad Co. 9 id. 323. The Earl of Ripon v. Hobart, Cooper's R. 343 S. C., 3 Myl. & K. 169.

[7] Fisk v. Wilbur, 7 Barb. 395.

ment of a franchise or privilege conferred by statute or prescription. Thus, where a turnpike company, incorporated with the exclusive privilege of erecting toll gates, and receiving toll, had opened and established a road, and certain persons, to avoid paying toll, opened a by-road, at their own expense, near the turnpike, by which travelers were enabled to avoid passing through the gate, the court granted a perpetual injunction to prevent the use of such road, and ordered it to be shut up.[1] The ground of the jurisdiction, in such cases, is the avoiding of multiplicity of suits, and the protection of the plaintiff's right from a fraudulent evasion. The plaintiff must be in possession of the franchise, and his title be beyond dispute, to entitle him to the relief by injunction.

The principle applies as well to a bridge or ferry, at which toll may be lawfully received by the plaintiff, as to a turnpike company. When one has a grant of a ferry, bridge or road, by prescription, with the exclusive right of taking toll, the erection of another ferry, bridge or road, so near it as to create a competition injurious to the franchise, is in respect to such franchise a nuisance, and equity will grant a perpetual injunction to secure the enjoyment of such statute franchise, and prevent the use of the rival establishment.[2] The same doctrine applies to any exclusive privilege created by statute; all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect and take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great, expensive and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is a grant of a right to an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful.[3]

In the cases above mentioned, the rival establishment of the defendant was not sanctioned by any statute, but was the act of the individual defendant alone. His act was held to be wrongful and fraudulent as against the plaintiff deriving his title by statute, or prescription. But if the grant by statute to the plaintiff of the franchise of a bridge, for example, contains no words, excluding the right of the legislative power to grant a

[1] Croton Turnpike v. Ryder, 1 J. Ch. R. 611. Livingston v. Van Ingen, 9 J. R. 507. Whitchurch v. Hide, 2 Atk. 391.

[2] Newburgh Turnpike v. Miller, 5 J. Ch. R. 101, 111. Ogden v. Gibbons, 4 id. 150, 160.

[3] Per Kent, Ch., in Newburgh Turnpike v. Miller, 5 id. 112.

similar franchise to others, accommodating the same line of traval, the exclusive privilege of the first grantee must be treated as subordinate to the right of the legislature to make such other or further grants as they may deem expedient.[1] The second grant, being derived from the samo source as the first, cannot be treated as a nuisance to the franchise first conferred. Public grants are construed strictly; and the grantees take nothing by implication.[2] Although the first grantee will be protected in his franchise as against an unauthorized and fraudulent competition, yet he has no claim to an injunction against subsequent grantees, from the same legislative power, unless he can show in its grant an express exclusion of all power to make another grant, which will conflict with it.

To constitute a private nuisance to a dwelling house, so as to give to the owner a right of action, it is not necessary that the latter should have been driven from it. It has already been said, that it is enough that the enjoyment of life and property has been rendered uncomfortable.[3] This may be produced by trades that occasion great noise, dust and smoke, as well as by occupations which immediately affect the health. Thus, the manufacturing of steam engine boilers, though a lawful business, may be carried on in such places, and in such a manner, as to become a great annoyance to the immediate neighbors, and to entitle them to redress by a civil action.[4]

An ordinary instance of the granting of an injunction in England, is to restrain a party from building so near the plaintiff's house as to darken his windows. But the injunction in these cases will not be granted, unless the windows in question be ancient lights, and the act is in violation of some agreement, either express or implied.[5] According to the modern English doctrine, the quiet and uninterrupted enjoyment and possession of window lights for twenty years is sufficient ground for a jury to presume a covenant, provided the evidence be such that the owner of the adjoining premises had knowledge, during that period, of the fact. The knowledge of the tenant alone is not enough for this purpose.[6] This right cannot be claimed in opposition to a grant, without reservation, by the owner of the adjoining land.[7]

An action for opening a window to disturb the privacy of the plaintiff

[1] Charles River Bridge v. Warren Bridge, 11 Peters, 420.

[2] Id.

[3] Rex v. White, 1 Burr. 337, per Lord Mansfield. Fish v. Dodge, 4 Denio, 326.

[4] Id.

[5] Eden on Inj. 269.

[6] Cross v. Lewis, 2 B. & C. 686. Daniel v. North, 11 East, 372.

[7] Palmer v. Fletcher, 1 Lev. 122. 2 Steph. N. P. 1015.

cannot be maintained, and the only remedy is to build on the adjoining land opposite to the offensive window.[1]

The English doctrine with respect to ancient lights has not been generally adopted in this country. In one case, Ch. Justice Savage assumed that an action upon the case lay for stopping the ancient lights of another, but the case he was considering called for no decision of the point.[2] In a later case, the reasoning of Bronson, J., tends to disprove the existence, in this state, of the modern English doctrine on the subject of lights. He thinks it cannot be applied to the growing cities and villages of this country, without working the most mischievous injustice; and that it has never been deemed a part of our law.[3] The case did not call for a decision to that extent. The learned judge at the circuit having ruled that the *law* presumed a grant as to windows, from a user of twenty years, and declined leaving to the jury the question of presumption, and instructed them that the plaintiff was entitled to their verdict, the court held that the defendant was entitled to a new trial, in order that the question of presumption of a grant might be submitted to the jury. It would seem that though the court cannot, as matter of law, yet a jury may, as *matter of fact*, presume a grant, from a quiet and uninterrupted possession of ancient lights, for a period of twenty years.[4] And it would seem, also, that the presumption in these cases is a mixed one of law and fact, to be passed upon by the jury, under the direction of the court. Lord Mansfield, on one occasion, said the enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant, or otherwise, that, unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a statute of limitations; it is certainly a *presumptive bar*, which ought to go to a jury.[5] In a plain case, where there is no evidence to repel the presumption arising from twenty years uninterrupted adverse user of an incorporeal right, the judge may very properly instruct the jury, that it is their duty to find in favor of the party who has had the enjoyment; but still it is a question for the jury.[6]

If the right at law be clear, and not doubtful or in dispute, the same principle, which justifies the interposition of courts of equity to restrain

[1] Chandler v. Thompson, 3 Camp. 80, per Le Blanck, J. Mahan v. Brown, 13 Wend. 261.

[2] Mahan v. Brown, id. 263.

[3] Parker v. Foote, 19 id. 318.

[4] Id.

[5] Darwin v. Upton, 2 Saund. 175, b, n. 2. Parker v. Foote, 19 Wend. 314.

[6] Per Bronson, J., in same case, 316. And see 3 Kent's Com. 448.

or prevent other private nuisances, will sanction its interference to prevent by injunction the obstruction of ancient lights.[1]

Notwithstanding the doubt cast upon the subject by some dicta in Parker v. Foote, (supra,) it is, nevertheless, believed, that where the enjoyment of the easement has been uninterrupted for the period of twenty years, and under a claim or assertion of right, and with the knowledge and acquiescence of the owner of the adjoining land, and where no circumstances exist tending to repel the presumption, the jury may infer the right.

Nor is it indispensable in order to acquire the right in question, that the building should be erected on the extremity of the plaintiff's lot. If it be erected so near the line, that a building erected on the extremity of the adjoining lot will darken the windows, the plaintiff is entitled to the like protection as if his own house was erected on his own line.[2] But this does not entitle the plaintiff to relief, unless the obstruction be such as materially to affect the light in the plaintiff's house. It must be such as to occasion a real diminution of the value of the plaintiff's property.[3] It is not sufficient, to constitute an illegal obstruction, that the plaintiff had in fact less light than before; nor that his house could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, there must be a substantial privation of light, sufficient to render the occupation of the house *uncomfortable*, and to prevent the plaintiff from carrying on his accustomed business on the premises, as *beneficially* as he had formerly done.[4]

The obstruction of a prospect, or of the free circulation of air, occasioned by building on one's own land, in the usual and reasonable manner, will not be enjoined by a court of equity. The erection of a building in a crowded city, on the opposite side of the street, is clearly lawful, although it may intercept the view from the plaintiff's premises, and impede, to a certain extent, the circulation of air.[5]

It is said to be the usual and most correct mode of proceeding in equity, in cases of public nuisance, for the attorney general to file an information.[6] But it is thought, nevertheless, that he may maintain a bill for that purpose. In a case in this state, where the proceeding was by information to enjoin an unincorporated banking company from the exercise of the

[1] Robeson v. Pettinger, 1 Green's Ch. R. 57; and see Banks v. American Tract Society, 3 Saund. Ch. R. 438.

[2] Cross v. Lewis, 2 B. & C. 686.

[3] Pringle v. Wernham, 7 C. & P. 377, per Lord Denman.

[4] Back v. Stacey, 2 C. & P. 465, per Best, Ch. J. Parker v. Smith, 5 C. & P. 438, per Tindal, Ch. J.

[5] Gwin v. Melmoth, Freeman's Ch. R. 505.

[6] Baines v. Baker, Ambler, 159. 3 Atk. 351.

franchise of banking,[1] Chancellor Kent thought that unauthorized banking was not such a nuisance as a court of equity could restrain, and that the remedy was in a court of law. Whatever ground formerly existed for doubts on this subject, the Revised Statutes have removed them. By the act concerning proceedings against corporations in equity the chancellor was empowered, upon a bill filed by the attorney general, to restrain by injunction any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business, not allowed by its charter; and in the same manner, to restrain any individual from exercising any corporate rights, privileges or franchises, not granted to them by any law of this state.[2] The jurisdiction over the directors and the funds of the corporation is most ample, for all purposes of relief; and authority is given, when the court is possessed of the cause, to restrain all proceedings at law, by any creditor, against the defendant in the suit.

The jurisdiction which courts of equity exercise over individuals extends to acts done, or omitted to be done, by corporations, whether municipal or private. Where the plaintiff, and those under whom he claimed, had been in the quiet and uninterrupted possession of a lot of land for twenty-five years and upwards, the court restrained by injunction the corporation of the city of New-York from entering upon and disturbing such possession, under pretense that the buildings encroached on the public street, until the right of the corporation was first established at law.[3]

In the owning of title to land, a municipal corporation exercises not a public but a private function. In respect to such property, the corporation stands upon the same footing as an individual, and has no more right to erect and maintain a nuisance on its land than possessed by a private citizen,[4] and it will be restrained in like manner. So where land is conveyed to a city in trust, to be kept open as a public street, one who owns a lot upon and has been assessed for opening it, can enforce the execution of the trust; and if the corporation permits the adjoining owners to inclose portions of it for court yards, he may have an injunction against it.[5] So where the trustees of a village are not authorized by their charter to alter the grade of a street, after the same has been regulated and established by them, as directed by the act of incorporations, the owners of adjoining land, which will be seriously injured by an alteration of the grade, are entitled to the interposition of a court of equity by injunction

[1] Att'y Gen. v. Utica Ins. Co. 2 J. Ch. R. 375.

[2] 2 R. S. 462, § 1.

[3] Varick v. Mayor of N. Y. 4 J. Ch. R 53.

[4] Brown v. Mayor of N. Y. 3 Barb. S. C. R. 255, 258.

[5] Lawrence v. Mayor of N. Y. 2 Barb S. C. R. 578.

to restrain trustees from altering the grade.[1] In like manner an injunction will lie at the suit of the people, to prevent the tapping of a public canal by an individual; and, it seems, the fact that the encroachment will not be injurious to the canal, is no objection to granting the writ. The belief of the officer in charge of the work that the encroachment will be injurious is decisive, though opinions to the contrary be sworn to.[2]

Analogous to nuisance is a purpresture. A purpresture, according to Coke, is where one encroacheth, or makes that several to himself, which ought to be common to many.[3] In its common acceptation, it is at present understood to mean an encroachment upon, and inclosure of the property of the public in a highway, river, harbor or street.[4] The remedy for this species of injury is either by information of intrusion at common law, or by information at the suit of the attorney general in equity.[5] In case of judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated; but upon a decree in an information in equity, if it appears to be a purpresture, without being at the same time a nuisance, the court may direct an inquiry whether it be most beneficial to the crown to abate the purpresture, or to suffer the erection to remain, and be arrented.[6] But if the purpresture be also a nuisance, this cannot be done, for the crown cannot sanction a nuisance.[7]

A purpresture which is not a nuisance, can be suppressed only on the application of the public, through the attorney general, and is not the foundation of a private action, either at law or in equity.

A purpresture may exist without being a nuisance. But in most cases an inclosure of a street, river or harbor, amounting to a purpresture, is also a nuisance, either public or private, or perhaps both; and may be suppressed, like other nuisances, by indictment, or by a proceeding in equity. Prima facie, says Chancellor Walworth, the person who appropriates any part of a public street, or harbor, exclusively and permanently to his own use, without the consent of the legislature or the municipal authorities, is guilty of a nuisance, and he subjects himself to the burden of proving that it is no injury to the public, and that a public right has

[1] Oakley v. Trustees of Williamsburgh, 6 Paige, 262. Trustees of Watertown v. Cowen, 4 id. 510. Att'y Gen. v. Forbes, 2 Myl. & Craig, 123.

[2] The Att'y Gen. v. The Cohoes Co. 6 Paige, 133.

[3] 2 Inst. 38.

[4] Eden on Inj. 259. Att'y Gen. v. Utica Ins. Co. 2 J. Ch. R. 381.

[5] Id., and Att'y Gen. v. Richards, 2 Anst. 603.

[6] Id.

[7] Id. Rex v. Grosvenor, 2 Stark. N. P. 511.

not been violated. On this principle, where a floating store-house was permanently moored in the Albany basin, secured in its place by means of spiles or posts driven into the earth, in the bottom of the river, and which was of great convenience to the complainants, and those having dealing with their transportation line, in the transaction of their business, the court of chancery held it to be a nuisance, and refused to restrain the corporation of the city of Albany from removing it as such.[1] This erection fell clearly within the definition of a purpresture, but it was also a nuisance, from its tendency to obstruct the free passage of boats and other craft.

The erection of a wharf in a public river is a nuisance, and it has been held to be no justification, in an indictment, that it has been beneficial to the public.[2] In one case, on an indictment for a nuisance, by erecting staiths in a navigable river for loading ships with coal, the learned judge charged the jury that the use of a navigable river was not for passage only, but for other important rights, which might supersede the right of passage; and that where a great public benefit accrued from that which occasioned the abridgment of the right of passage, that abridgment was not a nuisance, but proper and beneficial;[3] and this ruling was approved by two judges against the opinion of Lord Tenterden. But the doctrine of this case was distinctly overruled in a later case, founded upon better reasons.[4] It was thus shown that the violation of rights, which belong to one part of the public, cannot be vindicated by the benefits which may arise to another part of the public elsewhere.

Many of the principles applicable to nuisances to navigable rivers, and the remedies therefor, are elaborately discussed in a recent case in the supreme court of the United States.[5] While it is admitted that the federal courts have no jurisdiction of common law offenses, and cannot sustain an indictment for a nuisance, yet their chancery jurisdiction gives them a right to interpose and to restrain by injunction a nuisance which is a private injury to the complainants.

The right of navigating a public river does not conflict with the right of bridging it. These two rights may be so exercised as not to be incom-

[1] Hart v. Mayor of Albany, 3 Paige, 213; affirmed on appeal, 9 Wend. 571.

[2] Respublica v. Caldwell, 1 Dallas, 150. Rex v. Grosvenor, 2 Stark, N. P. 511.

[3] King v. Russell, 6 B. & C. 56.

[4] The King v. Ward, 4 Adolph. & Ell. 384.

[5] State of Pennsylvania v. Wheeling Bridge Co. 13 How. 515, and S. C. 9 id. 647. 11 id. 528. Devoe v. The Penrose Bridge Co. 3 Am. L. Reg. 79. And see an able article in 3 Am. L. Register p. 1, on the question, are state bridges constitutional?

patible with each other. It is not necessary to constitute the bridge a nuisance, that it should entirely stop the navigation of the river. If it be such an obstruction as to change, to any considerable extent, the line of transportation through Pennsylvania, whose public works were injured by the interruption of the navigation of the river, so as to divert it to other routes, an injury is done to that state, as the proprietors of those public works. Such an injury could not be adequately compensated at law. From the nature of the wrong, the compensation could not be measured or ascertained with any degree of precision. It would be of daily occurrence, and would require numerous if not daily prosecutions. It was therefore a proper case for the interposition of the equity powers of the court. In the application of these powers, if the obstruction by the bridge be shown to be a purpresture, or a nuisance, there is no room for a calculation and comparison between the injuries and benefits which it produces.

The ground of equity jurisdiction, in such cases, is the inadequacy of the remedy at law, the necesssity of restraining irreparable mischief, and the suppressing vexatious and interminable litigation. Formerly, courts of equity were reluctant to interfere by injunction, until the right had been established by a verdict. But if the thing sought to be suppressed be in itself a nuisance, and if the plaintiff's title to relief be undoubted, there is no occasion to wait the result of a trial.[1] The doubts expressed by Lord Eldon,[2] and Chancellor Kent,[3] do not now exist, whatever grounds for them there may have been at the time they were expressed.[4]

The remedy in equity to suppress purprestures and nuisances is greatly preferable to an action at law for damages, or a proceeding by indictment. In the latter remedy, there is less facility of protecting the rights of all parties than by the former. In a bill to restrain a bridge as a nuisance, on the ground of its obstructing the navigation of a river, by steamboats, the court can direct such modifications and alterations in the bridge, without abating it altogether, as will remedy the evil complained of.[5]

It was said by Lord Brougham, that the jurisdiction of courts of equity over nuisances by injunction is of recent growth. It is not, therefore, a matter of astonishment, that doubts should formerly have been started,

[1] Ripon v. Hobart, 3 Myl. & K. 169. 6 Paige, 563.

[2] Att'y Gen. v. Cleaver, 18 Ves. 218.

[3] Att'y Gen. v. Utica Ins. Co. 2 J. Ch. R. 371, 383.

[4] State of Penn. v. Wheeling Bridge Co. 13 How. 568.

[5] Id. 625, 626 the decree in that case.

where none exist now; nor can that be called an unwise discretion, which will induce the court to pause before they will interrupt men in those modes of improving their property, which are *prima facie* harmless and praiseworthy; and which may be beneficial to one party, and possibly prejudicial to none.[1]

SECTION VIII.

OF INJUNCTIONS TO RESTRAIN THE MULTIPLICITY OF SUITS, TO QUIET POSSESSIONS, TO REPRESS VEXATIOUS LITIGATION, TO PROTECT CORPORATIONS IN THE ENJOYMENT OF THEIR FRANCHISES, AND IN MISCELLANEOUS CASES.

THE interference of equity to restrain a multiplicity of suits, to quiet possession, and to repress vexatious litigation, was considered, to some extent, under the head of bills of peace and quia timet. The mode in which relief is given is, in general, by injunction. The restraining of a judgment debtor from disposing of his property, is often granted at the instance of a judgment creditor, who has exhausted his remedy at law. A common interest in the relief sought, is sufficient to authorize several judgment creditors of the same debtor to unite in the same bill.[2] But enough has been said on this subject, under the head of fraud. The court also exercises the power of restraining the usurpation of corporate powers, the alienation of corporate property, and a benign jurisdiction in the case of insolvent corporations. This jurisdiction is regulated by statute in this state,[3] and will be treated more fully in a subsequent chapter.[4] And the process of injunction is very freely used as the instrument of effecting justice, in most of these cases.

A few cases not falling under the preceding heads will now be adverted to, in order that the jurisdiction in this class of cases may be more fully illustrated. In some the injunction was granted, and in some refused.

Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage the other work.[5]

[1] Ripon v. Hobart, 3 Myl. & K. 169.

[2] Edmeston v. Lyde, 1 Paige, 637. Conro v. Port Henry Iron Co. 12 Barb. 27.

[3] 2 R. S. 462.

[4] See post, CHAP. XI.

[5] Seeley v. Fisher, 11 Sim. 581. Brandreth v. Lance, 8 Paige, 24.

A court of equity will not restrain a man from making a reasonable improvement on his own premises, upon the ground that it cannot be made without endangering an edifice erected on the adjacent premises, if the owner of the adjacent premises does not possess any special privileges protecting him from the consequences of such improvement, either by prescription or by grant, from the person making the improvement, or from those under whom he claims title.[1] A man is not answerable for the consequences of enjoying his own property in the way in which such property is usually enjoyed, unless an injury results to another from the want of proper care or skill on his part.[2]

A railroad in a street, pursuant to law, and so constructed and used as not to impair the public right of way, is not such a nuisance to the owners of property upon the street as will authorize an injunction.[3]

We alluded, under the head of fraud, to the subject of imitating trade marks, newspapers and the like, and remarked that equity granted relief in such cases on the ground of fraud.[4] The mode of redress is in such cases by injunction. A party may have a property in the good will of an established trade, the custom of an inn and the like, which will be protected by injunction. The competition between rival establishments will not be restrained, if there be no imposture or deception. The assuming of the name and dress of the plaintiff's newspaper, by the defendant, for the purpose of imposing upon the public, and supplanting the plaintiff's paper, is an injury which will be redressed by injunction.[5]

But the party has a property in trade-marks, which have been long used by him, and which are generally understood as designating his own articles of manufacture, which will be protected from invasion by a court of equity, independent of the fraud of the defendant.[6] Much stronger is the claim to the protection of the court, when the defendant, with full knowledge of the plaintiff's rights, and with the fraudulent intention of supplanting him, simulates his marks, so as to deceive the public.[7] And it is wholly immaterial whether the simulated articles be or be not of equal goodness and value to the original article, made for sale by the plaintiff. Nor is it important whether the plaintiff was the original inventor or proprietor of the article made by him, and upon which he now puts his trade-mark, nor whether the article made and sold by the defendant, under the

[1] Lasala v. Holbrook, 4 Paige, 169.

[2] Radcliff's Ex'rs v. Mayor of Brooklyn, 4 Comst. 196.

[3] Hamilton v. N. Y. and Harlem Railroad, 9 Paige, 171. Drake v. Hudson R. Railroad, 7 Barb. 508.

[4] Ante, p. 206.

[5] Bell v. Lock, 8 Paige, 75. Snowden v. Noah, Hopk. 347.

[6] Millington v. Fox, 3 Myl. & C. 338.

[7] Taylor v. Carpenter, 11 Paige, 292

plaintiff's trade-mark, is an article of the same quality or value. The court proceeds upon the ground, that the plaintiff has a valuable interest in the good will of his trade or business; and that having appropriated to himself a particular label or sign, or trade-mark, indicating to those who wish to give him their patronage, that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of his friends or customers, or the patrons of his trade or business, by sailing under his flag, without his authority or consent.[1]

The alienage of the person whose trade-marks are simulated, and his residence in a foreign country, do not affect his right to their exclusive use, when he has introduced them here. And it seems the commission merchant who sells the spurious article, knowing its character, is equally, with the maker of it, liable to a suit to restrain the further sale of it.[2]

On similar principles, the surviving partner is entitled to an injunction against the executor of the deceased partner, to restrain him from using the name of the partnership in carrying on his business.[3] The good will of a partnership goes, it seems, on the death of one of the partners, to the survivors.[4]

The cases where the aid of a court of equity has been invoked to restrain the use of trade-marks are numerous, and the doctrine of the court is well established. The same principle applies here as in other cases in equity. The title of the plaintiff must be clear and beyond dispute, and he must not have been guilty of fraud upon the public in the thing represented by his trade-marks.[5]

The right claimed to a trade-mark does not partake of the nature and character of a patent or copyright.[6] The defendant may sell the same goods, or manufacture goods of a like description. The ground of relief in equity, after the plaintiff has been shown or admitted to be in the use of the particular trade-marks, is, that the defendant had no right to sell his own goods as the goods of another. As was said by Lord Langdale, on one occasion, no man has a right to dress himself in colors, or adopt and

[1] Partridge v. Menck, 2 Barb. Ch. R. 104. Amoskeag Manuf. Co. v. Spear, 2 Sand. Ch. R. 559. Coates v. Holbrook, id. 586.

[2] Coates v. Holbrook, 2 Sand. Ch. R. 586, 603. Taylor v. Carpenter, id. 603. Partridge v. Menck, 2 id. 622. S. C. 2 Barb. Ch. R. 104

[3] Lewis v. Landon, 7 Sim. 421.

[4] Id.

[5] Pidding v. How, 8 Sim. 477. Perry v. Truefit, 6 Beavan, 66.

[6] Per Spencer, senator, in Taylor v. Carpenter, 2 Sand. Ch R. 617.

bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with, and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud.[1]

In New-York, the willful counterfeiting of private stamps and labels of the mechanic or manufacturer, with intention to defraud either the purchaser or the manufacturer, is made a misdemeanor, punishable by fine and imprisonment; and the same principle is applied to the vendor of the counterfeited article, knowing it to be such, as to the counterfeiter himself.[2] The object of this law is to place under the ban of legislative condemnation a species of fraud, which courts of civil jurisdiction are not always able to suppress.

The application for an injunction should be promptly made, by the plaintiff, on the discovery of the wrong committed by the defendant. If he is guilty of unreasonable delay, the court will not interfere in a summary way, but perhaps retain the bill, with liberty to the plaintiff to establish his right at law.[3] After a decree for an injunction restraining the defendant from using trade-marks, the acquiescence of the plaintiff, and his low estimation of the value of the right protected, will be an answer to a motion to commit the defendant for a breach of the injunction.[4] The consent of the manufacturer to the use or imitation of his trade-marks by another, may be inferred from his knowledge and silence; but such consent, when purely gratuitous, is merely a revocable license, and is no cause for refusing an injunction.[5]

It may be added, that if it is not clear that the simulated marks will deceive the public, an injunction will not be granted until the right has been established.[6]

By the constitution of this state, all corporations have the right to sue, and are subject to be sued, in all courts, in like cases as natural persons.[7] This applies as well to municipal corporations as to corporations of a different description. While a court of equity will not interfere to control the exercise of a discretionary power, where the discretion is legally

[1] Croft v. Day, 7 Beav. 88.

[2] Laws of 1845, p. 304, ch. 279.

[3] Flavel v. Harrison, 19 Eng. L. & E. 15.

[4] Rodgers v. Nowill, 17 id. 83.

[5] Amoskeag Manuf. Co. v. Spear, 2 Sand. Ch. R. 599.

[6] Id.

[7] Const. of 1846, art. 7, § 3.

and honestly exercised, it will interfere whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice or oppression, the violation of a trust, or the consummation of a fraud.[1] Whenever a corporation is about to exceed its powers, and apply its funds or credit to some object beyond its authority, and whenever the purpose of the corporation, if carried out, would constitute a breach of trust, a court of equity cannot refuse to interfere and give relief by an injunction.[2] The jurisdiction thus rests upon the same foundation as the jurisdiction to control the action of individuals, or copartnerships, under similar circumstances. In dealing with questions of property, a municipal corporation is amenable to the judicial tribunals of the country. But the performance of its legislative duties, when it has a discretion to exercise, will not be controlled. For its violation of duty in that respect it is amenable only to its constituents.[3]

In some cases the court will, on account of the heavy injury arising to a railway company, from having its works stopped, refrain from issuing an injunction, provided it undertakes to do that which the court decides it is bound to do. Thus, where a railway company was bound by its act of incorporation, if it crossed a turnpike road, to raise or sink such road, so that either the road should pass over the railway, or the railway pass over the road by means of a bridge of stated height and width, and the company laid down rails across a turnpike road, and used them for carrying on the works, by conveying materials thereon in wagons drawn by horses, the court held, that before making the railway, the company was bound to build a bridge, but having regard to the long continued injury which would be inflicted on the company, by restraining it till the bridge was built, the court, instead of granting an injunction *simpliciter*, put the company on terms to build a proper bridge, otherwise an injunction to be granted.[4] The same principle was settled in another case.[5]

But in a case where a railway act enacted that whenever it should be found necessary to cut through, take, or so much injure any part of any quay, wharf, or other communication, as to render the same impassable or inconvenient for transporting, &c. any goods, the company should cause another equally convenient quay or other communication to be constructed; an injunction, restraining the company from prosecuting any works which rendered the plaintiff's wharf inconvenient, was sustained, pending

[1] Davis v. Mayor of N. Y. 1 Duer, 498.

[2] Id. Agar v. Regents' Canal Co. Cooper's Eq. Cases, 77. Milhau v. Sharp, 15 Barb. 194.

[3] Milhau v. Sharp, id. 193.

[4] Northern Bridge and Road Co. v. London and Southampton Railway Co. 1 Railway Cases, 635.

[5] Jones v. Great Western R. Co. 1 Railway Cases, 684.

an inquiry at law, whether the company, having carried the railroad in front of his wharf, so as to cut off its general access to the water, and having made a jetty leading from the water to the wharf, had complied with the terms of the act. And the injunction was so sustained, notwithstanding it appeared that the further prosecution of the works would do no greater amount of injury to the plaintiff than had already been done, and that the only effect of sustaining the injunction would be to stay the completion of the railway.[1]

Persons who contribute to a fund on condition that a literary and theological seminary shall be located *permanently* in a specified place, and which, in consideration thereof, is accordingly located there permanently, have a right to apply to a court of equity for an injunction to prevent an illegal and unauthorized removal of the seminary to another place.[2]

A railway in a city is not *per se* a nuisance or a purpresture.[3] In the city of New-York, the corporation has the power and right to authorize the use of its streets for a railway. The owners of real estate in the city and its tax payers have such an interest in preventing the misapplication of the property of the corporation, as to enable them to institute a suit in equity to restrain them from making an improvident grant.[4]

An injunction to prevent a public nuisance is never granted on the application of a private individual, unless the apprehended nuisance would be specially dangerous to himself or injurious to his property.[5]

An injunction to prevent a public nuisance, merely from apprehended dangers to the community, can only be granted on the application by the attorney general in behalf of the people.[6] And the court will not, on the appplication of an individual, grant an injunction to the agent of the state prison and a contractor, to prevent the making of contracts contrary to the act which restricted the labor of convicts, except in certain cases, to the trades which they had learned previous to their conviction.[7] The statute in question is entirely prohibitory, and does not confer any individual right. It is designed for the public good, and any infringement of it is a wrong to the public, for which the people in their

[1] Bell v. Hull and Selby R. Co. 1 Railway Cases, 616.

[2] Hascall v. The Madison University, 8 Barb. 174.

[3] Milhau v. Sharp, 15 Barb. 193. Plant v. Long Island Railroad Co. 10 id. 26. Chapman v. Albany and Shenectady Railroad, id. 360. Adams v. S. and W. Railroad, 11 id. 414. Hodgkinson v. L. I Railroad, 4 Edw. Ch. R. 411.

[4] Milhau v. Sharp, 15 Barb. 193.

[5] Smith v. Lockwood, 13 Barb. 228 per Strong, P. J.

[6] Smith v. Lockwood, id. 209, 220.

[7] Laws of 1847, p. 614, § 71.

collective capacity alone are entitled to redress.[1] An injunction will not be granted to prevent the perpetration of an act prohibited by a public statute, because it might diminish the profits of a trade or business pursued by the applicant in common with others.[2]

If an ordinance of a municipal corporation be void, an injunction will be granted, on a proper application, to prevent its enforcement.[3]

Courts of equity sometimes recognize rights which a court of law would be inadequate to protect. They will not permit a defendant to derive an advantage from a breach of faith or of contract. Thus, where a secret for compounding a medicine, not protected by a patent, was imparted to the defendant in breach of faith and contract on the part of the party by whom it was communicated, the court restrained the defendant by injunction from using the secret.[4] So where a defendant had been an assistant of the plaintiff in his business, Lord Eldon, upon the express ground of breach of trust and confidence, granted an injunction to restrain the defendant from using or communicating recipes, which he had surreptitiously copied whilst in the plaintiff's service.[5]

On this same principle of breach of confidence, the court will restrain the publication of the lectures of a professor, against his consent, although the lectures were not written, but were in whole or in part oral.[6] The student acquires no right to publish them.

The observations of Vice Chancellor Wigram, on one occasion, illustrates the same principle. He says, that every clerk employed in a merchant's counting house is under an implied contract, that he will not make public that which he learns in the execution of his duty as clerk. If the defendant (speaking of the case before him) has obtained copies of books, it would very probably, said his lordship, be by means of some clerk or agent of the plaintiff; and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, he thought he could not be permitted to avail himself of that breach of contract.[7]

It has been shown that courts of equity interfere by injunction, to protect individuals in the enjoyment of a franchise created by statute. It may be added, that an injunction will be granted to prevent the franchise

[1] Smith v. Lockwood, 13 Barb. 217, per Strong, P. J.

[2] Id.

[3] Wood v. City of Brooklyn, 14 Barb. 425.

[4] Morrison v. Moat, 6 Eng. L. & E. 14.

[5] Yovatt v. Winyard, 1 Jac. & W. 395. Williams v. Williams, 3 Meriv. 159. Newbery v. James, 2 id. 447

[6] Abernethy v. Hutchinson, 3 L. J. Ch. 209. 6 L. & E. 29.

[7] Tipping v. Clarke, 2 Hare, 393.

of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges.[1]

The foregoing view of the jurisdiction of courts of equity, in matters remediable by injunction, is far from being perfect. The extent to which the jurisdiction may be carried is not marked out by any adjudged case, and from the nature of things, it must forever remain undefined. In modern times the injunction has been more extensively used than in the earlier stages of the law. It is not only the great preventive remedy of fraud and injustice, but is often used to enforce the performance of an active duty. In many of the cases cited, its twofold office has been exemplified. The process to give possession of land to the purchaser, on the foreclosure of a mortgage, partakes of this character.[2]

In treating the subject, we have necessarily repeated some matters which have already been partially discussed under other heads, and anticipated others, which will be again brought to our notice. It is only by viewing a principle in its various bearings, that it can be thoroughly understood, and its application to human affairs be properly appreciated.

[1] Osborn v. U. S. Bank, 9 Wheat. 738. [2] Eden on Injunc. 425.

CHAPTER VII.

OF USES AND TRUSTS.

THE Revised Statutes of New-York enact, that uses and trusts, except as authorized by the act, are abolished; and that every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided.[1] It is impossible to understand the full force of the legislative enactments on this subject, without some general understanding of the doctrine of uses and trusts in force at the time of the revision. We shall, therefore, before treating of trusts in particular instruments, give, by way of introduction, a brief general view of the doctrine of trusts before the adoption of the Revised Statutes, and of the changes introduced by the revision.

SECTION I.

GENERAL VIEW OF USES AND TRUSTS BEFORE, AND AS MODIFIED BY THE REVISED STATUTES.

AT common law, trusts were of two kinds; the *simple* trust, and the *special* trust. The *simple* trust, which also was called a use, was defined to be, "a confidence not issuing out of the land, but as a thing collateral, annexed in *privity* to the estate of the land, and to the *person* touching the land, viz. that *cestui que use* should take the profits, and that the terre-tenant should execute estates according to his direction, and plead such pleas as he should supply him with, at the cost and expense of the *cestui que use*."[2]

The feoffee to whom the estate was thus conveyed had the freehold or sole property in him. And the *cestui que use* had neither *jus in re*, nor

[1] 1 R. S. 727, § 45.

[2] 2 Fonb. Eq. B. 2, ch. 1, § 2. Bac. Abr. tit. Uses and Trusts, part 1. Coke Litt. 272, b.

jus ad rem, but only a confidence or trust, for which he had no remedy at the common law, but for the breach of the trust his remedy was in a court of equity.[1]

To every use at common law there were two inseparable incidents—a *privity* in estate, and a *confidence* in the person. And when either of these failed, the use was suspended or destroyed.

The equitable right of cestui que use extended to all who claimed in *privity* under the feoffee; that is, who came to the estate by *contract* with him. But it did not extend to those who did not take the identical estate in the land to which the use was attached, nor to one who claimed by title paramount. And thus, a disseisor would take the estate discharged of the use; for with regard to him, there was neither privity of estate, or confidence in the person creating the use, and both must concur in order to continue the use.

Confidence in the person was either express or implied. There was an express confidence in the original feoffee to uses. If the feoffee, for a good consideration, enfeoffed a stranger who had no notice of the use, the latter took the estate discharged of the use, and the use was destroyed. In such case, the feoffee having no notice of the use, it could not be said that a trust was reposed in him to let the cestui que use take the profits; but if he had notice, a trust might be said to be reposed in him, since he took the estate with knowledge of the charge. So, also, if the feoffment had been made *without consideration*, though the feoffee had no notice of the use, yet he would nevertheless have stood seised to the use. The law in this case *implied* notice of the use, and consequently the trust remained.[2] In *simple* trusts, the trustee was merely passive. The cases just considered are of that character. In *special* trusts, an active duty was imposed upon the trustee, for the breach of which the remedy was in equity.

Both the *simple trust* or *use*, and the *special trust*, were applicable to chattels, real and personal, as well as to freeholds. Trusts of chattels were conducted upon the same principles as trusts of freeholds. The right to enforce their performance depended on privity.

It is quite obvious that this system could readily be perverted into an instrument of fraud. Lord Bacon observes, that by this course of putting lands into use, there were many inconveniences, as the practice which originated in a reasonable cause, (viz. to give men power and lib

[1] 2 Fonb. Eq. B. 2, ch. 1, § 2. Bac. Abr. tit. Uses and Trusts, part 1. Coke Litt. 272, b.

[2] Bac. Abr. tit. Uses and Trusts, part 1

erty to dispose of their own,) was turned to deceive many of their just and reasonable rights; as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by the curtesy, the lord of his wardship, relief, heriot and escheat; the creditor of his extent for debt; the poor tenant of his lease for the rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee in trust, and so the old owner which we call the feoffer, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee. To remedy these and and other inconveniences, various statutes were from time to time enacted, during the period of upwards of a century, all tending to fix upon the *cestui que use* the obligations of an owner, until at length, by the act of 27 Henry 8th, commonly called the statute of uses, it was enacted, after reciting the said grievances, that when any person should be *seised* of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail for life or years, or otherwise, should thenceforth stand, or be seized or possessed of the lands, &c., of and in the like estate, as they have in the use, trust, or confidence; and that the estate of the person so seised to uses, shall be deemed to be in him or them that have the use, in such quality, manner, form or condition as they had before in the use.[1] This statute was re-enacted in this state.[2]

Uses, by the operation of the statute, became merged in the legal estate; but *special trusts* and *trust of chattels* were not within the purview of the statute; the former, because the use, as well as the legal interest, was in the trustee; the latter, because a termor is said to be *possessed*, and not to be seised of the property.

The uses which were thus transferred into possession became legal estates, and were governed by the doctrines of courts of law. They became an extensive branch of the law of real property.

It was probably the object of the act to abolish uses altogether. But the construction put upon it by the judges, at an early day, in a measure defeated that intent. Thus, in the limitation of an estate to A. and his heirs, to the use of B. and his heirs, in trust for D., it was held that B.'s estate was executed, and that D. took nothing. The statute was held to be satisfied by executing the first use. Courts of equity took hold of this

[1] 2 Fonb. Eq. B. 2, ch. 1, § 3, note. See an abstract of these statutes in Bac. Abr. tit. Uses and Trusts.

[2] R. L. of 1813, vol. 1, 72. Act of Feb. 20, 1787.

construction, and said that the intention must be supported. It is plain that B. was not intended to take. His conscience was affected. To this the reason of mankind assented, and it has stood on this footing ever since. And by this means a statute, made upon great consideration, introduced in a solemn and pompous manner, by this construction has had no other effect than to add at most three words to a conveyance.[1] The second use in these cases, though void under the statute, was treated by courts of equity as a *trust*, and enforced as such. The remedy was in equity alone, and courts of law took no cognizance of it. This was the origin of trusts, as they have been administered since the statute of uses. A trust, says Kent, Ch. J., is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery which were formerly applied to uses.[2]

A use at common law might be created two ways: 1st, by the intent of the parties upon the transmutation of possession; or 2d, by an agreement, upon an effectual consideration, without transmutation of possession. Uses, which pass by transmutation of possession, were raised by a feoffment, fine or recovery, or lease and release. Those raised without transmutation of possession were raised either by way of bargain and sale enrolled, in consideration of money, or by way of covenant to stand seised, in consideration of blood.[3] The intent upon transmutation of possession might be declared by writing or by parol. Upon common law, says Gilbert,[4] an use might have been raised by word upon a conveyance that passed the possession by some solemn act, as a feoffment; but when there was no such act, then it seems a deed declaratory of the uses was necessary, for as a feoffment which passed the estate might be made at common law by parol, so, by the same reason, might the uses of the estate be declared by parol; but when a deed was requisite to the passing of the estate itself, it seems it was necessary for the declaration of the uses: therefore a man could not covenant to stand seised to an use without a deed, there being no solemn act.[5]

An agreement to raise an equity to have the land, ought to have an effectual consideration; as money, pains and travail, marriage or natural affection. For an use will not arise by deed without an actual consideration; although a deed for the solemnity imports a consideration in law.

[1] Per Lord Hardwicke, Hopkins v. Hopkins, 1 Atk. 591. Jackson v. Cary, 16 J. R. 302. Jackson v. Fleet, 14 Wend. 179.

[2] Fisher v. Fields, 10 J. R. 506. Johnson v. Fleet, 14 Wend. 180. per Nelson, J.

[3] Gilbert on Uses, 75, 82. 2 Fonb. Eq. B. 2, ch. 2, § 1 and notes.

[4] Gilbert on Uses, 270.

[5] Shepherd's Touchstone, 519. Gilbert on Uses, 270. 2 Fonb. Eq. B. 2, ch. 2, § 1, note.

And there are two sorts of good consideration; a consideration of nature and blood, and a valuable consideration.[1] But though a consideration be absolutely requisite to the raising of an use, upon a covenant to stand seised, yet no consideration need be mentioned in the deed. But if the cestui que use stand in a relation which affords of itself a consideration, an use shall presently arise to him; as if a man covenant to stand seised to the use of his wife, or brother, or any of his kindred, this is sufficient to raise an use to them, without any mention of a particular express consideration; for the love and affection between them is obvious; which being a consideration in itself sufficient to raise an use, the limiting of the use shall be referred to such consideration.[2] And so with respect to uses raised by bargain and sale, for though they can only be raised for an actual and valuable consideration, yet the consideration need not be necessarily expressed in the deed, in order to raise the use; for the bargainee may aver that money or other valuable consideration was given or paid; and if shown, the bargain and sale shall be good.[3] But if a consideration be required by the statute, as in some instances under the statute of frauds, to be expressed in the instrument, the omission to specify it therein will, it seems, be fatal. But if the contract be not within the statute, the consideration may be shown by parol.[4]

The inconveniences which were found to arise from allowing parol declarations of trust, induced the legislature, by the act of 29th Charles 2d, chapter 3, § 7, re-enacted in this state in 1787,[5] to require all declarations or creations of trust or confidences of any lands, tenements or hereditaments, to be manifested and proved by some writing signed by the party who is or shall be by law enabled to declare such trust, or by his last will in writing. The statute excepted trusts arising or resulting by implication or construction of law, or to be transferred or extinguished by act or operation of law. But it did not extend to declarations of trusts of personalty, but they were left as at common law.[6] It was sufficient, under the statute, if the terms of the trust could be ascertained by the writing. It was not essential that it should be *created* by an instrument in writing; if it was evidenced by a writing, it was enough, and which writing might be subsequent to the commencement of the agreement,[7] the statute merely required the declaration of the trust to be *manu-*

[1] 2 Fonb. Eq. B. 2, ch. 2, § 2.

[2] Gilb. Uses, 251, 252. Bedell's case, 7 Rep. 40.

[3] 2 Inst. 672.

[4] Barnes v. Perine, 15 Barb. 250; aff. on appeal.

[5] 1 R. L. 79, § 12.

[6] 2 Fonb. Eq. B. 2, ch. 2, § 4, note x.

[7] Forster v. Hale, 3 Ves. 696. Steere v. Steere, 5 J. Ch. R. 1. Fisher v. Fields, 10 J. R. 495. Malin v. Malin, 1 Wend. 625.

fested and proved by some writing signed by the party, &c. Hence the trust could be proved by any subsequent acknowledgment of the trustee, however informally or indirectly made, as by a letter under his hand,[1] by his answer in chancery,[2] or by a recital in a deed,[3] and the like.

The New-York Revised Statutes have made some alterations in the former law. Thus, they enact that no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be *created*, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, *subscribed* by the party *creating*, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto, authorized by writing.[4] It was evidently the intention of the legislature to alter the former law, and to require a writing in order to *create*, &c. the trust; and to give more solemnity to the transaction, they required this writing to be *subscribed* by the party *creating*, &c. the trust, or by his lawful agent, &c. This is plain from a reference to the notes of the revisers, and to the decision of the court of errors in 1841, under a corresponding change of phraseology in the second title of the same chapter.[6] The section must then be understood as requiring the declaration *creating* the trust to be reduced to writing at the time it was made, and to be *subscribed* by the party who thus creates it. Under the former statute, which required contracts to be *signed*, it had been held that the statute was satisfied, if the contract was in writing, and the names of the parties appeared therein.[7] The plain intent of the revised act was to change the rule which formerly prevailed, and to substitute *subscribing*, by which was meant a literal *subscribing* of the agreement at the end thereof. The chancellor considered that the provisions under the section, relative to real property, should receive the same construction as the section relative to personal property or contracts.[8]

The statute also extends to *assignments*, so as to embrace the transfer of terms for years, or other chattel interests.

In New-York, the law with respect to uses and trusts underwent a great change at the revision of the statutes in 1830. The object of the legislature

[1] Forster v. Hale, 3 Ves. 696.

[2] Hampton v. Spencer, 2 Vern. 288. Cottington v. Fletcher, 2 Atk. 155.

[3] Deg v. Deg, 2 P. Wms. 412.

[4] 2 R. S. 134, § 6.

[6] See Revisers' notes, 3 R. S. 655 et seq.

[6] 2 R. S. 135, § 2 of title 2. Davis v. Shields, 26 Wend. 341.

[7] Merritt v. Classon, 12 J. R. 102; affirmed on error, 14 id. 487. Davis v. Shields, 26 Wend. 351.

[8] 3 R. S. 584, Revisers' notes Johnson v. Fleet, 14 J. R. 180.

was to put an end to mere formal, passive trusts, by converting them into legal estates in the beneficial owner, and thus effectuate the original intention of the statute of uses.[1] To accomplish this purpose, uses and trusts, except as authorized and modified by the act, were abolished, and every estate and interest in lands was declared to be a legal right, cognizable as such in courts of law, except when otherwise provided by the act.[2] This general abolition of uses was not intended to effect estates then held as uses, executed under any former statute, but the same were confirmed as legal estates.[3] And the section which accomplished the main purpose of the legislature was in these words: "Every person, who by virtue of any grant, assignment, or devise, now is or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have the legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest."[4]

By a subsequent article, the legislature abolished the mode of conveying lands by feoffment with livery of seisin[5]—a mode of conveyance, previously lawful, but which was not used in practice.[6] And they adopted *grants* as the instrument for conveying a fee or a freehold estate. A grant must be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent. And if not acknowledged as required by the recording acts, must be attested by at least one witness. And if not so attested, it shall not take effect, as against a purchaser or incumbrancer, until so acknowledged.[7] The grant takes effect only from its delivery. Deeds of bargain and sale, and of lease and release, are still permitted to be used, and are deemed grants.[8]

The operation of the 47th section, as was remarked by the court in one case,[9] accomplishes all that could have been effected by the most liberal construction claimed for the statute of uses. All former trusts created, however numerous or extended the series, are as by magic transformed into legal estates. A conveyance to A. in trust for B., in trust for C., at once vests the title in C., and would vest the title in the *cestui que trust* last named, however numerous the trusts created. Whether the legal title would pass through each *cestui que trust*, or at once pass from the grantor or devisor to the last, has not yet been decided.

[1] 3 R. S. 584, Revisers' notes. Johnson v. Fleet, 14 J. R. 180.
[2] 1 R. S. 727, § 45.
[3] Id. § 46.
[4] Id. § 47.
[5] Id. 738, § 136.
[6] 4 Kent's Com. 489.
[7] 1 R. S. 738, § 137.
[8] Id. §§ 138, 142.
[9] Johnson v. Fleet, 14 Wend. 180.

It is further enacted, that the effect of the 47th section shall not divest the estate of any existing trust, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the lands which are the subject of the trust.[1] That class of trusts was left unexecuted by the statute of uses, and was enforced only in equity. The legal estate was in the trustee, because, without such legal estate, the latter could not fulfill the purposes of the trust.[2]

The benefits resulting from the abolition of uses and formal trusts could not be accomplished, unless their future creation was prevented. This object was attained by the 49th section, which enacts that every disposition of lands, whether by deed or devise, hereafter made, shall be directly to the person in whom the right to the possession and profits shall be intended to be invested, and not to any other, to the use of, or in trust for, such person; and if made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee.[3] In a case of this kind, the title, by operation of the 47th section, vests directly in the party entitled to the beneficial interest.[4]

The statute recognizes the existence of two kinds of trusts: 1st, express trusts; and 2d, implied trusts, under which are included resulting trusts. The former are created by deed or will, and the latter arise in general by construction of law, upon the acts or situation of the parties.[5]

Before the Revised Statutes, it was well settled that a resulting trust did not come within the statute of frauds, and that it could be proved by parol.[6] If A. purchased land with his own money, but took the deed in the name of B., a trust resulted by operation of law to A.[7] So if a person purchased land with the money of another, and took a deed for it in his own name, a trust resulted in favor of the one to whom the money belonged.[8] In all these cases parol evidence was admissible to establish the trust, not only against the face of the deed itself, but in opposition to the answer of the trustee denying the trust, even after the death of the nominal purchaser. If part only of the consideration was paid, the trust resulted only *pro tanto*.[9]

[1] 1 R. S. 727, § 48.

[2] 1 Mad. Ch. Pr. 356, 357.

[3] 1 R. S. 728, § 49.

[4] Braker v. Devereaux, 8 Paige, 518.

[5] Johnson v. Fields, 14 J. R. 181. 1 Mad. Ch. Pr. 354. 1 R. S. 728, §§ 50–55.

[6] Boyd v. M'Lean, 1 J. Ch. R. 582. Jackson v. Sternbergh, 1 J. C. 153.

[7] Boyd v. M'Lean, supra.

[8] Jackson v. Sternbergh, supra. Jackson v. Matsdorf, 11 J. R. 91. Jackson v. Mills, 13 id. 463. Jackson v. Morse, 16 id. 197.

[9] Boyd v. M'Lean, supra. Botsford v. Burr, 2 J. Ch. R. 405.

But now, by the Revised Statutes, resulting trusts are abolished, except in favor of creditors of the party paying the consideration, to the extent that may be necessary to satisfy their just demands; and except in cases where the person taking the absolute conveyance in his own name, does it without the consent or knowledge of the person paying the consideration, or where such alience, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person.[1]

But it is expressly enacted, that no implied or resulting trust shall be alleged or established to defeat or prejudice the title of a purchaser, for a valuable consideration, and without notice of such trust.[2] The consideration of implied trusts will form the subject of remark in a subsequent part of this chapter.[3]

Express trusts are allowed by the statute to be created for any or either of the following purposes: (1.) To sell lands for the benefit of creditors. (2.) To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon. (3.) To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of title 2, chapter 1, of part 2. (4.) To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the said first article.[4] In addition to the express trusts above mentioned, the act of 1840[5] permits real and personal property to be *granted* and *conveyed* to any incorporated college or other literary incorporated institution in this state, to be held in trust for either of the following purposes: (1.) To establish and maintain an observatory; (2.) To found and maintain professorships and scholarships; (3.) To provide and keep in repair a place for the burial of the dead; and (4.) For any other specific purposes comprehended in the general objects authorized by their respective charters. By the same statute, real and personal estate may be granted and conveyed to the corporation of any city or village of this state, to be held in trust for any purpose of education, or the diffusion of knowledge, or for the relief of distress, or for parks, gardens, or other ornamental grounds, or grounds for the purposes of military parades and exercise, or health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the grantor or donor, and agreed to by such corporation; and all real estate so granted or conveyed to such corporation may

[1] 1 R. S. 728, §§ 51, 52, 53.
[2] Id. § 55.
[3] See post, § 16 of CHAP. VII.
[4] 1 R. S. 728, § 55.
[5] Act of 1840, ch. 318, p. 267.

be held by the same, subject to such conditions as may be prescribed and agreed to as aforesaid.

And by the same act, real and personal estate may be granted to commissioners of common schools of any town, and to trustees of any school district, in trust for the benefit of the common schools of such town, or for the benefit of the schools of such district. The trusts authorized by the act are allowed to continue for such time as may be necessary to accomplish the purposes for which they may be created And by an act the following year, *devises* and *bequests* of real and personal property in trust were authorized for any of the purposes for which the trusts under the act of 1840 were authorized; and were made valid in like manner, as if such property had been granted and conveyed according to the provisions of the former act.[1] By force of the foregoing statutes, trusts for the specified purposes may be created either by *grant* or *will*. And by a subsequent act, the income arising from any real and personal property granted, conveyed, devised, or bequeathed in trust to any incorporated college or other incorporated literary institution, for any of the purposes specified in the said act of 1840, or for the purpose of providing for the support of any teacher in any grammar school or institute, may be permitted to accumulate till the same shall amount to a sum sufficient, in the opinion of the Regents of the University, to carry into effect either of the purposes designated in said trust.[2]

And by an act passed in 1845, any receiver appointed by virtue of an order or decree of the court of chancery was authorized to take and hold real estate upon such trusts and for such purposes as the court might direct, subject to the further order or direction of the court, from time to time, in relation to the disposition of such real estate.[3]

In addition to the foregoing, there are several acts upholding trusts, to a certain extent, in favor of the United Society of the people commonly called Shakers, and in favor of the Religious Society of Friends, and in favor of the community of True Inspiration, the consideration of which do not fall within the scope of this treatise.[4]

It has already been said that a purchaser for a valuable consideration with notice of the trust, and a purchaser without consideration without notice, were, in each case, held to be trustees for the persons beneficially

[1] Laws of 1841, ch. 261, p. 265.

[2] Laws of 1846, ch. 74, p. 76.

[3] Laws of 1845, ch. 112, p. 90. Wilson v. Wilson, 1 Barb. Ch. Rep. 594. Porter v. Williams, in Court of Appeals, 1853.

[4] 2 R. S. 4th ed. 138, 139, where these acts are collected.

interested.[1] To discourage secret trusts, which are the common instruments of fraud, and to make it the intent of the parties that the trust should be expressed in the deed, the Revised Statutes have provided that where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void.[2] Of course, in such case, no estate passes to the purchaser. But if the trust be not expressed in the instrument, the purchase from the trustees is governed by the rules of the common law. And the purchaser is not chargeable with notice, without proof.

The Revised Statutes have also provided, that no person, who shall actually and in good faith pay a sum of money to a trustee, which the latter is authorized to receive, shall be responsible for the proper application of such money, according to the trust; nor shall any right or title derived by him from such trustee, in consideration of such payment, be impeached or called in question, in consequence of any misapplication, by the trustee, of the moneys paid.[3]

At common law the trustee might devise the trust estate, but the devisee took subject to the original trust.[4] The cases show that it may be devised by general words. But if there be other expressions or purposes in the will that indicate an intention to the contrary, the trust was held not to pass.[5] So, a trust estate descended in the same manner as legal estates.[6] If the trust was of personal property, it passed to the personal representatives of the trustee, subject to the trust. In short, it followed in general the rules of law with respect to the transmission of property.[7]

These rules have been wisely abrogated by the Revised Statutes, with respect to express trusts, which enact, that upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the court of chancery, now the supreme court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court.[8]

When the purposes for which an express trust shall have been created shall cease, the estate of the trustee also ceases.[9] This is merely declaratory of the existing law.[10]

[1] Murray v. Ballou, 1 J. Ch. R. 575. Frost v. Beekman, id. 301. Johnson v. Fleet, 14 Wend. 181.

[2] 1 R. S. 730, § 65.

[3] Id. § 66.

[4] Marlow v. Smith, 2 P. Wms. 198. Braybroke v. Inskip, 8 Ves. 417.

[5] Id.

[6] Banks v. Sutton, 2 P. Wms. 713, 736.

[7] Id.

[8] 1 R. S. 730, § 68.

[9] Id, § 67.

[10] Parks v. Parks, 9 Paige, 107. Irving v. Dekay, id. 523.

The purpose of the legislature to abolish passive trusts would have sometimes worked injustice but for some substituted provision. Thus, while it is enacted that a devise of lands to executors or other trustees, to be sold or mortgaged, when the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees, it is nevertheless declared that the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.[1] At common law, such devise carried the fee of the estate, because the devisee could neither sell or mortgage the estate without being first clothed with the title.[2] An absolute power of disposition was, at common law, incompatable with an estate less than a fee.

Where a trust is created to recive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable, in equity, to the claims of the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution at law.[3] And no person, beneficially interested in a trust for the receipt of the rents and profits of land, can assign or in any manner dispose of such interest.[4] The effect of the two last provisions is, when taken together, that after the creditor of the *cestui que trust* has exhausted his remedy at law, by execution against the property of his debtor, he may by a creditor's bill reach the surplus income of such debtor's interest in rents and profits, or income of property, which the cestui que trust cannot alienate and dispose of in anticipation; so as to satisfy the judgment out of that part of the income which may not be necessary, from time to time, for the education and support of the cestui que trust.[5]

But suppose this provision be made for a married woman, it seems that as she cannot pledge or create a charge upon her interest in such a trust, in anticipation of the income which may thereafter accrue, or become payable to her, and as she cannot contract a personal liability upon which a judgment can be recovered, her interest even in the surplus income which is not necessary for her support, cannot be reached except for a debt contracted before marriage.[6]

[1] 1 R. S. 729, § 56. Germond v. Jones, 2 Hill, 570, 573.

[2] Helmer v. Shoemaker, 22 Wend. 137. Jackson v. Delancy, 11 J. R. 36. S. C. in error, 13 id. 537. Jackson v. Robinson, 15 id 169. S. C. in error, 16 id. 537.

[3] 1 R. S. 729, § 57.

[4] Id. 730, § 63.

[5] L'Amoureux v. Van Rensselaer, 1 Barb. Ch. R. 37.

[6] Id.

Previous to the adoption of the Revised Statutes, a trustee might hold the mere naked legal estate in real property, for a feme covert, while the whole equitable interest and estate therein was in her, and subject to her control. In relation to such an estate, therefore, she was considerd as a feme sole, and could charge her equitable interest in the property with any debt she might think proper to contract on the credit thereof, which was not inconsistent with the trust, or with the nature of her interest in the premises, and which was authorized by the instrument or conveyance creating the trust. All such mere formal trusts, even in favor of femes covert, are now abolished. And in the few trusts which are authorized by the Revised Statutes, the whole estate, both legal and equitable, is vested in the trustee. The statute also declares, in terms, that the person for whose benefit the trust is created, shall take no estate or interest in the land, but may enforce the performance of the trust in equity.[1]

Though the owner of real or personal estates, may create an interest in the rents and profits, or the income thereof, under the provisions of the Revised Statutes, in trust for the use or benefit of a third person, whom from improvidence or otherwise the donor does not think proper to intrust with the absolute disposition and control of his beneficial interest in the trust property, by anticipation, yet neither law or sound policy will allow an absolute and unconditional right to property to be vested in a person, which he may use and dispose of as he pleases, by anticipation or otherwise, but in relation to which property he may set his creditors at defiance, by means of a mere nominal trust. Hence an annuity bequeathed by the testator to his widow in lieu of dower, and charged upon his real and personal estate by his will, is liable to the claims of the creditors of the widow, and may be reached by a creditor's bill against her.[3] Such annuity is in no sense a trust, within the meaning of the Revised Statutes. It stands on the footing of an ordinary pecuniary legacy charged upon real estate.[4]

The trust, which is not assignable, and which cannot be anticipated, or reached by a creditor's bill against the cestui que trust, is a trust to receive the rents and profits of lands. But the rights and interest of every person for whose benefit a trust for the payment of a *sum in gross* is created are assignable, and consequently can be reached by a creditor's bill against the party beneficially interested in it.[5]

[1] L'Amoureux v. Van Rensselaer, 1 Barb. Ch. R. 37. 1 R. S. 729, § 60. Bard v. Fort, 3 Barb. Ch. R. 634.

[2] Degraw v. Clason, 11 Paige, 140.

[3] Id.

[4] Id. 141.

[5] 1 R. S. 730, § 63. Degraw v. Clason, 11 Paige, 136.

Where an express trust is created for any purpose not enumerated in the act, no estate vests in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power is valid as a power in trust, subject to the provisions in relation to such powers, contained in the Revised Statutes.[1]

In one case it was said, that a general power in trust is where an authority is given to the grantee to do some act, in relation to lands, which the grantor might lawfully perform; and when he is authorized to alienate the lands in fee, by means of a conveyance to any alienee whatever; and where some persons, other than the grantees of the power, are designated as entitled to the proceeds or other benefits to result from the alienation according to the power.[2] Thus, a trust to sell lands and divide the proceeds among the cestui que trusts, as beneficial owners, and not as creditors, is void as a trust, but valid as a power in trust.[3]

In every case where the trust is valid as a power, the lands to which the trust relates remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.[4] And the general principle is declared that every express trust, valid as such, in its creation, except as is otherwise provided, vests the whole estate in the trustees, in law and in equity, subject only to the execution of the trust. And the beneficiary, as already stated, takes no estate or interest in the lands, but may enforce the performance of the trust in equity.[5]

Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance is deemed absolute, as against the subsequent creditors of the trustees not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration.[6] This enactment is merely declaratory of the existing law, as has already been shown in the commencement of this chapter. A purchaser with notice of the trust, though upon full consideration, and a purchaser without consideration, are still bound by the trust unless indeed the trust is expressed in the instrument creating the estate in which case, instead of converting the purchaser into a trustee, as at common law, we have seen that the statute makes the sale absolutely void.[7]

The supreme court having now the jurisdiction formerly possessed by the court of chancery, is clothed with power to accept the resignation of a

[1] 1 R. S. 729, § 58.
[2] Selden v. Vermilyea, 1 Barb. S. C. R. 58.
[3] Id. 1 R. S. 728, § 55.
[4] Id. 729, § 59.
[5] Id. § 60.
[6] Id. 730, § 64.
[7] Id. § 65, and ante.

trustee, and discharge him from his trust, under such regulations as shall be established by the court for that purpose, and upon such terms, as the rights and interests of the persons interested in the execution of the trust may require. The court also possesses the power of removing a trustee who has violated or threatened to violate his trust, or who is insolvent, or for apprehended insolvency, or who for any other cause shall be deemed an unsuitable person to execute the trust. It possesses power also to appoint a new trustee in the place of the one who has resigned or been removed. And when, in consequence of such resignation or removal, there shall be no acting trustee, the court in its discretion may appoint new trustees, or cause the trust to be executed by one of its officers, under its direction.[1] And it is a general principle, that the court never permits a valid trust to fail for want of a trustee.[2]

The trusts which we have been considering, are those which have been authorized or modified by the Revised Statutes, and have reference only to real estates.[3] They have of themselves nothing to do with personal property, either directly or by reference.[4] The Revised Statutes have not attempted to define the objects for which express trusts of personal estate may be created, as they have done in relation to trusts of real estate. Such trusts, therefore, may be created for any purposes which are not illegal. Indeed it would be very difficult, if not impossible, in many cases, to create and preserve future and contingent interests in personal property, without the intervention of a trustee; although trustees would not be necessary, under the provisions of the Revised Statutes, to create and preserve such future and contingent interests in lands or other real estate. In all other respects, however, except as to the mere vesting of the legal title to the property in the trustee, instead of the cestui que trust, the conveyance or bequest of personal estate must be governed by the same rules, which are applicable to a grant or a devise of a similar interest in lands or real property. Independent of the common law principle of analogy between estates or interests in real and personal property, the statute creates such analogy, by restricting the power of suspending the absolute ownership, or the right of alienation, within the same limits; by confining the power of accumulating the income of personal estate, and the rents and profits of real estate, to the same objects and within the same bounds; and finally declaring, in general terms, that in all other respects, limitations of future or contingent interests in personal property

[1] 1 R. S. 730, §§ 69, 70, 71.

[2] De Peyster v. Clendining, 8 Paige, 296. King v. Donnelly, 5 id. 46.

[3] 1 R. S. 727 to 731.

[4] Kane v. Gott, 24 Wend. 661, per Cowen, J

shall be subject to the rules prescribed by the Revised Statutes in relation to future interests in lands.[1]

Previous to the Revised Statutes, a trust for the accumulation of the rents of real estate, or of the income of personal property might be created, to continue for the same length of time that the power of alienation or the absolute ownership of such property might legally be suspended. And the accumulated fund might be limited to any person or class of persons who should be *in esse* at the termination of such trust.[2] But such cannot now be created in this state. For by the provisions of the Revised Statutes a valid trust for the accumulation of the rents and profits of real estate, or the interest or income of personal property, can only be created for the benefit of a minor or minors, who is or are in existence when the accumulation is to commence; and the accumulation must cease with the termination of such minority.[3]

The effect which an invalid trust will have upon one authorized by law and contained in the same instrument, or which is created at the same time, has often been considered, in this state, since the Revised Statutes. If the trust relates to personal property, the courts will sustain such as are legal and valid, if they can be separated from those which are illegal and void.[4]

The same rule applies, it seems, to trusts of real property. In one case it was said, that though some of the objects for which a trust is created, or some future interest limited upon the trust, are illegal or invalid, if any of the purposes of the trust are valid, the legal title vests in the trustees during the continuance of the valid objects of the trust, unless the legal and valid objects of the trust are so mixed up with those which are illegal and void, that it is impossible to sustain the one without giving effect to the other.[5]

Where property is bequeathed in trust and no trustee is appointed, the court, in case of real estate, considers the heir at law as a trustee, and in regard to personal estate, it considers the personal representatives as the trustee. And when an estate is devised in trust to a body incapable of taking, the trust will attach upon the estate, and the heir become the trustee.[6]

[1] 1 R. S. 773, § 2. Gott v. Cook, 7 Paige, 534, 534. S. C. on appeal, 24 Wend. 641. De Peyster v. Clendining, 8 Paige, 305.

[2] Bryan v. Knickerbacker, 1 Barb. Ch. R. 425. Thellusson v. Woodford, 4 Ves. 227. 11 id. 112, S. C.

[3] 1 R. S. 726, §§ 37, 38. Id. 773, §§ 3, 4. Bryan v. Knickerbacker, 1 Barb. Ch. R. 425, 426.

[4] Van Vechten v. Van Veghten, 8 Paige, 104. De Peyster v. Clendining, id. 306. 26 Wend. 21, S. C. affirmed.

[5] Irving v. Dekay, 9 Paige, 523. S. C. on appeal, 5 Denio, 646.

[6] 1 Mad. Ch. Pr. 364.

As a general rule, it may be said, that when the legal and equitable title are both united in the same person, in the same right, the equitable is merged in the legal title, and is extinguished by the unity of seisin.[1] There are some exceptions to this rule, which are the most frequently exemplified in mortgage securities. If the situation of the estate, or the interest of the mortgagee, requires that the lien of the legal estate should be kept distinct, or if the mortgagee, by reason of infancy, lunacy, or other disability, is unable to make an election, or if there be a decisive intention of the mortgagee to keep them separate, a court of equity will prevent a merger, and preserve the estates distinct.[2] But this subject will be treated more fully under the head of Mortgages.

It was formerly held that the trusts, which were the creatures of a court of equity, and were not cognizable in a court of law, were not within the statute of limitations.[3] The Revised Statutes enacted, that whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, the statute of limitations is alike applicable to both courts. But that provision was not extended to cases, over the subject matter of which a court of equity had a peculiar and exclusive jurisdiction, and which subject matter was not cognizable in the courts of common law.[4] Bills for relief, on the ground of fraud, were limited to six years after the discovery of the fraud by the aggrieved party. And bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not otherwise provided for, were limited to ten years after the accruing of such action.[5] The code fixes the limitation of six years to an action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery. The cause of action in such case was not deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud.[6]

The foregoing general view of the nature of trusts, as they are affected by the Revised Statutes, is sufficient by way of introduction to the subjects hereinafter discussed.

We have said that trusts are either *express* or *implied;* express trusts are also executed or executory. And they may relate either to real or personal property.

Express trusts may be created either by *deed* or *devise.* We shall, in the remainder of this chapter, notice in the next place such express

[1] Nicholson v. Halsey, 1 J. Ch. R. 417.

[2] James v. Johnson, 6 id. 417. James v. Mowry, 2 Cowen, 246. Russell v. Austin, 1 Paige, 192.

[3] Kane v. Bloodgood, 7 J. Ch. R. 114 Murray v. Coster, 20 J. R. 576.

[4] 2 R. S. 301, §§ 49, 50.

[5] Id. §§ 51, 52.

[6] Code, § 91 sub. 6.

trusts as occur in deeds, mortgages, assignments, marriage settlements, or in executory contracts, and then notice such express trusts as are usually contained in wills, embracing legacies, charities, &c. We shall then briefly notice the doctrine of implied trusts, and several other topics incidental to the general subject, and conclude with a brief account of the duties of a trustee.

SECTION II.

OF MORTGAGES, BOTH OF REAL AND PERSONAL PROPERTY; EQUITABLE MORTGAGES; LIEN FOR THE PURCHASE MONEY; PLEDGES AND HYPOTHECATION.

IN the early stages of the English law there were two modes of pledging lands as a security for debts; the first by the debtor to his creditor, to be held until the rents and profits should equal the amount borrowed, when on discharge of the debt the land returned to the borrower. This was called *vivum vadium*, or a *living pledge*.

The second mode of pledging land is thus described by Littleton, § 332: "If a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c. forty pounds of money, that then the feoffor may re-enter, &c., in this case the feoffee is called tenant in mortgage, which is as much to say in French as *mort gage*, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c." This was called a mortgage.

Littleton treats of the subject under the head of estates upon condition. And it thus appears, from the foregoing passage, that a mortgage was created by a conveyance of the lands from the debtor to the creditor, upon condition, that if the money was paid on a certain day, the conveyance should be void; and the debtor might enter and have his former estate. But if default was made in payment of the money on the day appointed, then the lands became absolutely vested in the creditor, freed from the condition. And all the maxims of the common law, respecting the breach of a condition, were strictly applied to this kind of conveyance.

The inconvenience resulting from this mode of pledging land was, that

if the money was not paid at the day named in the deed, the estate was absolutely forfeited; and a subsequent tender of the money would be unavailable to the debtor, notwithstanding the estate mortgaged greatly exceeded in value the sum borrowed.[1]

The obvious injustice of this doctrine of the common law courts induced the court of chancery to interpose, and by an equitable and liberal construction, to mitigate the rigor of the common law. The latter court treated the lands mortgaged as a mere *security* for the payment of the sum borrowed, and the condition of forfeiture consequent upon non-payment at the day, in the nature of a *penalty*, against which it was the province of equity to relieve. The court said that the creditor was, in justice and conscience, entitled only to his principal, interest and costs, and they adopted the maxim, that though the condition was not strictly performed, whereby the estate was forfeited at law, yet if the debtor reimbursed the creditor within a reasonable time the money borrowed, with interest, he should be entitled to call on the creditor for a *reconveyance*.[2]

This right acquired the name of an *equity of redemption*, and became firmly established as a part of the equitable jurisdiction of the court of chancery as early as the reign of James the first.

At one time it was conceived that if the money loaned was not paid at the day, and the estate became absolute in the feoffee, that the lands would become chargeable with the dower of the wife of the feoffee, and be liable to forfeiture or escheat by his acts, and that the mortgagor could not be relieved against those who came in, in the *post*. But equity soon set this matter right, by holding that the subsequent payment of the money, reinvested the mortgagor with his former estate; and thus the redemption overreached all claim under the feoffee, such as dower, forfeiture and escheat.[3]

In equity, the mortgagee after forfeiture was treated with respect to the surplus, after payment of the mortgage money, as the *trustee* for the mortgagor. And though, in general, a trust is created by the *contract* of the parties, and they only are bound by it who come in, in privity of estate, or with notice, or without consideration, yet, a power of redemption was treated as an equitable right, inherent in the land, and binding all persons in the *post* or otherwise; and this, because it was an ancient right, to which the party was entitled in equity.[4]

It is upon the principle that an equity of redemption is a part of the

[1] Litt. § 332. Cruise's Dig. tit. 15 Mortgage, §§ 1 to 5.

[2] Cruise's Dig. tit. 15, ch. 1.

[3] 2 Fonb. Eq. B. 3, ch. 1, §§ 1, 2.

[4] Id. § 3.

law of the land, that it cannot in any way be provided by agreement, in case of a mortgage, that a court of equity should not give relief.[1] Though the deed be absolute on its face, yet if intended only as security, and accompanied by an agreement in writing or by parol, operating as a defeasance, it will be treated as a mortgage, and no agreement in it will prevail to change its character.[2]

A mortgage of lands, at the present day, is a conveyance by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed, or for the performance of some other act, and to be void upon such payment or performance.[3] It may be of an estate in fee, for life, or for years. It may also be of personal chattels, but the consideration of the latter will be postponed till the conclusion of the present subject.

A mortgage of real estate, of which we are now treating, may be made to secure the payment of money, or to do some collateral act. Thus, when a deed in fee simple was made with a condition, to be void if the grantor paid off and discharged certain legacies to the legatees therein named, and in the manner therein specified, and which were a charge upon the lands mortgaged, it was held to be a mortgage, and the remedy of the mortgagee to be in equity by a bill of strict foreclosure.[4] The assignment of a land contract for the security of a debt due to the assignee, upon the condition that if the debt was paid at the time stipulated, the assignee should reassign the contract, is in equity a mortgage, and the assignor has a right of redemption.[5] So a sealed instrument, granting land for the term of one year, on rent, and conditioned to be void on payment of a certain sum, and with a covenant on the part of the grantor to pay it at the end of the year, is a mortgage.[6] So a mortgagee may himself assign to a third person his mortgage as *security* for a sum of money, or other thing, and the assignment will be treated as a mortgage which he may redeem.[7] So an absolute assignment of a lease, accompanied with a bond, executed at the same time, reciting the assignment, and stating it to have been made to secure the payment of a sum of money to the

[1] 2 Fonb. Eq. B. 3, ch. 1, § 4. Henry v. Davis, 7 J. Ch. R. 40. Howard v. Harris, 1 Vern. 191. James v. Oades, 2 id. 402.

[2] Clark v. Henry, 2 Cowen, 332. Day v. Dunham, 2 J. Ch. R. 189. Peterson v. Clark, 15 id. 205.

[3] Cruise's Dig. tit. 15, Mortgage, ch. 1 § 11. Hilliard, vol. 1, ch. 29, § 1.

[4] Stewart v. Hucthins, 13 Wend. 485. Affirmed, 6 Hill, 143.

[5] Brockway v. Wells, 1 Paige, 617.

[6] Elliot v. Pell, id. 263.

[7] Slee v. Manhattan Co. id. 48.

assignee, and an agreement to reassign on payment of the money, is a mortgage.[1]

It is not necessary, in order to constitute the instrument a mortgage, that it should contain, or be accompanied by an agreement to reconvey, on payment, or performance of the condition. If there be evidence that the land was conveyed for the purpose of securing the repayment of a sum of money, or the performance of some collateral act, the instrument, though absolute on its face, will in a court of equity be treated as a mortgage, and be subject to all the incidents of that estate. The defeasance need not be contained in the deed, but if it be subsequently executed by the grantee, it is sufficient.[2] Nor is it indispensable that the defeasance should be by an instrument in writing. It is well settled that parol evidence is admissible, in a court of equity, to show that a conveyance absolute in its terms, was intended as a security for a debt.[3] If such was the object of the instrument, the setting it up as an absolute conveyance, is a fraud upon the grantor, and may afford evidence that the defeasance was omitted by accident or mistake. And under either head, equity can afford relief. As between the parties themselves, or purchasers with notice, or without consideration, the true character of the transaction may be shown, notwithstanding the statute of frauds.

The doctrine that parol evidence was admissible in a *court of law* to turn an absolute deed into a mortgage was for a time held in this state, but was overruled in a case in the court of last resort.[4] But the reversal does not affect the doctrine with respect to its admissibility in courts of equity, which remains now the same as heretofore. Indeed, the ground on which the doctrine was resisted when it was first introduced, was not that the evidence was under no circumstances admissible, but that it was not admissible in *a court of law*, and could only be received in equity where the rights of all parties could be properly guarded.[5]

[1] Jackson v. Green, 4 J. R. 186.

[2] Dey v. Dunham, 2 J. Ch. R. 182. S. C. on appeal affirmed, 15 J. R. 555.

[3] Strong v. Trustees of Mitchell, 4 J. Ch. R. 167. Marks v. Pell, 1 id. 594. Clark v. Henry, 2 Cowen, 324. Dey v. Dunham, 2 J. Ch. R 189. Peterson v. Clark, 15 J. R. 205. Gilchrist v. Cunningham, 8 Wend. 641 Yarborough v. Newell, 10 Yerg. 376. Whittick v. Kane, 1 Paige, 202. Slee v. Manhattan Co. id. 48. Van Buren v. Olmstead, 5 id. 9. Lansing v. Russell, 3 Barb. Ch. R. 325. James v. Johnson, 6 J. Ch. R. 417. 3 Atk. 389. 2 id. 99.

[4] Webb v. Rice, 6 Hill, 219; reversing the decision S. C., 1 Hill, 606. Roach v. Cosine, 9 Wend. 227. Walton v. Cranly 14 id. 63. Swart v. Service, 21 Wend 36.

[5] See dissenting opinion of Bronson in Swart v. Service, supra, and in Webb v. Rice, 1 Hill, 608.

A mortgage may contain a covenant from the mortgagor for himself his heirs, executors and administrators, to repay the money borrowed, with interest. In this state it is not the practice to insert a covenant in the mortgage for repayment, and the Revised Statutes have enacted that no mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured; and that where there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgage shall be confined to the lands mentioned in the mortgage.[1] They have also abolished all implied covenants in any conveyance of real estate, whether such conveyance contains special covenants or not.[2] The general practice is to take a separate bond, or promissory note for the payment of the sum intended to be secured by the mortgage. And the mortgage usually contains a power of sale authorizing the mortgagee or his assigns, or personal representatives, or on non-performance of the condition of the mortgage, to sell the premises at vendue to the highest bidder, and to convey the estate to the purchaser, rendering the surplus money, after paying the debt and costs, to the mortgagor, or his assigns or personal representatives. The object of the power of sale is to enable the mortgagee to foreclose the mortgage at law, by advertisement, and without an action, the proceedings to do which are pointed out in the statute.[3] But an account of this proceeding does not belong to the present treatise. An instrument conveying lands by mortgage is no less a mortgage without a power of sale than with one. If it contains no power of sale, and no covenant to pay, and is accompanied by no obligation to pay, the only remedy of the mortgagee is in equity, and is confined to the lands mentioned in the mortgage.

If a deed, absolute on its face, be intended as a mortgage, it should be recorded as a mortgage, in order to protect the land against the title of a subsequent bona fide purchaser. Recording it as a deed, is in such a case of no avail, for the purchaser is not bound to search the record of deeds, in order to be protected against the operation of a mortgage. Third persons have a right to know from the record, or from some other source, the object and intent of the conveyance.[4] Independent of the recording act, conveyances would take effect according to their priority. The recording act renders void an unrecorded conveyance as against any

[1] 1 R. S. 738, § 139.

[2] Id. § 140.

[3] 2 R. S. 545; see 2 R. S. 777, 4th ed. where the various amendatory acts are collected.

[4] Dey v. Dunham, 2 J. Ch. R. 132; S. C. on appeal, 15 J. R. 569, 570. 1 R. S. 756.

subsequent purchaser, in good faith, and for a valuable consideration, of the same real estate, or of any portion thereof, whose conveyance shall be first duly recorded.[1] And the statute expressly provides, that every deed, conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security, in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made, shall not derive any advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith, and at the same time.[2] But if the subsequent purchaser have notice of an unrecorded mortgage, he is not deemed a bona fide purchaser, within the meaning of the recording laws, and as to him the unrecorded mortgage will take effect according to the priority of date. Conveyances though unrecorded, are valid between the parties.[3]

It is not enough that an absolute deed intended as a mortgage is recorded in the book of deeds. It is well settled, that in order to protect the mortgagee, it must be recorded in the book of mortgages.[4]

When an absolute deed is intended only as a mortgage, a subsequent purchaser with notice, stands in the place of the equitable mortgagee.[5]

While a party who takes a mortgage subsequent to an unrecorded mortgage with notice, is postponed in the same manner as if the first had been recorded, his assignee, without notice and for valuable consideration, takes discharged of the previous mortgage.[6]

With respect to judgment creditors who seek either to set aside a deed as fraudulent, or, who claim that, though absolute in its terms, it was intended only as a security or mortgage, and thus seek to redeem, they have a right, even in a court of law, and much more in a court of equity, to show, by parol evidence, the character of the transaction. Creditors who are in a condition to impeach the sale may show any fact, either consistent or inconsistent with the deed, tending to prove that it was without consideration, that it was made with intent

[1] 1 R. S. 756, § 1.

[2] Id. § 3.

[3] Dunham v. Dey, 15 J. R. 569. Mills v. Comstock, 5 J. Ch. R. 214. James v. Johnson, 6 id. 417. Jackson v. Van Valkenburgh, 8 Cow. 260. Whittick v. Kane, 1 Paige, 202. White v. Moore, id. 551. Grimstone v. Carter, 3 id. 421.

[4] White v. Moore, 1 Paige, 551. Grimstone v. Carter, 3 id. 321. Brown v. Dean, 3 Wend. 208.

[5] Williams v. Thorn, 11 Paige, 459.

[6] Jackson v. Van Valkenburgh, 8 Cowen, 260.

to defraud creditors, that though absolute in terms, it was in truth a mortgage.[1]

If a deed of lands be given, absolute on its face, and a contemporaneous covenant executed between the parties, expressing the object of the conveyance, and importing a qualification of the title designed to be conveyed, both should be regarded as one instrument.[2] At law, it has been doubted whether an instrument containing no reservation of a right to redeem can be treated as a technical mortgage.[3] In an earlier case, Savage, chief justice, did not consider these words as indispensable, and he held that the intent to create a mortgage might be gathered from other expressions in the deed, indicating that the grantor did not part with all his interest, and that the overplus, beyond paying off certain securities, should be paid back to him.[4] In a court of equity, it has been seen that the interest, if not apparent on the deed, may be shown by parol. That court looks at the real object and intention of the conveyances; and when the grantor applies to redeem, upon the allegation that the deed was intended as a security for a debt, that court treats it precisely as it would an ordinary mortgage; provided the truth of the allegation is made out by the evidence. So too the grantee, in such a deed, may treat it as a mortgage, and, acknowledging it to be such, may apply to a court of equity to foreclose the equity of redemption, which will be decreed in like manner as if an unexceptionable defeasance were attached to the deed.[5]

There are some cases, partaking of the character of a mortgage, which may be upheld as trusts and enforced as such by a court of equity. Thus, where a deed of lands was executed, and a covenant made between the parties at the same time, declaring that the grantee should sell the lands to pay certain of the grantor's debts, and return to him the surplus, but containing no reservation of a right to redeem, the transaction was regarded by Bronson, J., as constituting a conveyance in *trust*, and not a *mortgage*.[6] According to Palmer v. Gurnsey, (*supra*,) this would be treated as a mortgage. But the later case of Baker v. Thrasher (*supra*) disapproves the doctrine of Palmer v. Gurnsey, and perhaps overrules it. But it does not affect the doctrine of courts of equity upon this subject.

[1] Per Savage, Ch. J., Jackson v. Myers, 11 Wend. 336, 337. Henry v. Davis, 7 J. Ch. R. 40. 1 Phil. Ev. 551. C. & H. Notes, 1448.

[2] Cooper v. Whitney, 3 Hill, 96.

[3] Id.

[4] Palmer v. Gurnsey, 7 Wend. 248 But see Baker v. Thrasher, 4 Denio, 495 contra, per Bronson, J.

[5] Hughs v. Edwards, 9 Wheat. 495.

[6] Cooper v. Whitney, 3 Hill, 96. 1 R. S. 728, § 55.

In this state, whether the mortgage be of lands in fee, for life, or years, no reconveyance is necessary on payment of the mortgage debt,[1] whether it be paid before or after it became due, and whether the mortgagor remained in possession or not.[2] This is believed to be the general doctrine in this country, when there are no statute regulations on the subject. The New-York Revised Statutes have provided for the discharge of registered or recorded mortgages, on the presenting to the clerk, in whose office the instrument is recorded, a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved and certified as required by the act, specifying that such mortgage has been paid, or otherwise satisfied or discharged.[3] The statute does not require any reconveyance, but treats the mortgage as extinguished by payment.

In this state, it has been held, from an early day, that the mortgagor is to be regarded as the owner of the land, and the mortgage treated as a mere incumbrance. The land mortgaged descends to his heirs as real estate. It is devisable as such. It is subject to the dower of the widow, and the curtesy of the husband. And it may be sold on execution against the mortgagor.[4]

It is, for these reasons, that the creditor in general requires that the wife should join in the mortgage with her husband, so as to pass her contingent right of dower. This would be unnecessary in England, where dower is not given of an equityof redemption. (See 2 Sch. & Lefr. 388.) But if the mortgaged premises be worth more than enough to satisfy and discharge the debt secured thereby, the widow is, in equity, entitled to her dower in the surplus.[5]

A mortgagee, whether before or after forfeiture, has no interest in the land which can be sold on execution. Before entry under his mortgage, he is not bound, as an assignee of the mortgagor, by a covenant running with the land, and cannot, under the Revised Statutes, maintain ejectment before foreclosure.[6] The mortgagor is, for every substantial purpose, the real owner of the land, and the mortgagee has merely a lien upon it.[7] The widow of the mortgagee is not entitled to dower, before fore-

[1] Jackson v. Davis, 18 J. R. 7.

[2] Jackson v. Stackhoven, 1 Cowen, 122. Arnot v. Port, 6 Hill, 65. Jackson v. Crafts, 18 J. R. 110.

[3] 1 R. S. 761, § 28.

[4] Waters v. Stewart 1 Cai. C. in Error, 47. Hitchcock v. Harrington, 6 J. R. 290. Collins v. Torry, 7 id. 278. Denton v. Nanny, 8 Barb. 618. Coles v. Coles, 15 J. R. 319.

[5] Titus v. Neilson, 5 J. Ch. R. 452.

[6] Aymar v. Bill, 5 id. 570. Morris v. Mowatt, 2 Paige, 586. Jackson v. Willard, 4 J. R. 10.

[7] Astor v. Miller, 2 Paige, 68. Astor v. Hoyt, 5 Wend. 602.

closure, for the reason that until then the husband is not seised, and without seisin, there is no dower.[1]

There is one exception to the rule that the widow of the mortgagor is entitled to dower; and that occurs when the seisin is instantaneous only, and immediately passes back to the grantor. Thus, where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money, at the same time he executes the deed, the deed and the mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act; in the same manner as a deed of defeasance forms, with the principal deed to which it refers, but one contract, although it be by a distinct and separate instrument.[2]

With respect to growing crops, raised annually by cultivation on the mortgaged premises, the title to these, on foreclosure, pass to the purchaser on the mortgage sale. The crop as well as the land is a security for the mortgage debt, and on the sale of the land passes to the purchaser.[3]

A mortgagor may cut timber on the mortgaged premises, if he does not unreasonably weaken the security of the mortgagee, and the latter, in such case, has no lien on the timber cut.[4]

If a mortgage be given as a security to cover unliquidated damages, the only remedy of the mortgagee, it would seem, is, on breach of the condition, in a court of equity. Such case is not supposed to be adapted to the statute foreclosure at law, which contemplates only mortgages conditioned for the payment of money.[5]

The English doctrine of tacking, was considered in a previous chapter, and was shown to have been abrogated by our recording laws.[6]

If there be several equitable interests affecting the same estate, they will, if the equities are otherwise equal, attach upon it, according to the periods at which they commenced; for it is a maxim of equity, as well as of law, that *qui prior est in tempore potior est jure*.[7]

It is said to have been the old rule in the English chancery, that if a person took a mortgage, and voluntarily left the title deeds with the mortgagor, he was to be postponed to a subsequent mortgagee without notice, and who was in possession of the title deeds. The reason of the

[1] 1 R. S. 740, § 1.

[2] Stow v. Tifft, 15 id. 158, 463. Holbrook v. Finney, 4 Mass. R. 569.

[3] Shepherd v. Philbrick, 2 Denio, 174. Lane v. King, 8 Wend. 584. Aldrich v. Reynolds, 1 Barb. Ch. R. 613. Gillet v. Balcolm, 6 Barb. 370.

[4] Ensign v. Colburn, 11 Paige, 503.

[5] Ferguson v. Kimball, 3 Barb. Ch. R. 619. Ferguson v. Ferguson, 2 Comst. 360 2 R. S. 545.

[6] Ante, pp. 255, 256.

[7] Per Kent, Ch., in Berry v. Mut. Ins Co. 2 J. Ch. R. 608.

rule was, that by leaving the title deeds, he enabled the mortgagor to impose upon others who had no registry to resort to. But it is now the settled English doctrine, that the mere circumstance of leaving the title deeds with the mortgagor is not, *of itself*, sufficient to postpone the first mortgagee, and to give the preference to a second mortgagee, who takes the title deeds with his mortgage, and without notice of the prior incumbrance. There must be fraud, or gross negligence, which amounts to it, to defeat the prior mortgage.[1]

With us the recording of the mortgage is a beneficial substitute for the deposit of the title deeds, and gives a more effectual security to subsequent mortgagees. The recording of the mortgage is notice. Leaving the title deeds with the mortgagor works no prejudice to the first mortgage, provided it is duly recorded.[2]

As between two unrecorded mortgages, they are to be paid according to their order of priority,[3] unless the first has been guilty of some fraud, other than leaving the title deeds in the possession of the mortgagor. That alone is not enough. A subsequent bona fide purchaser, without notice of an unrecorded mortgage, is protected by the statute against the mortgage.[4] The statute here speaks of purchasers, in the popular sense, as those who take an absolute estate in fee. A mortgage is in one sense a purchase. But there is neither reason or necessity for treating the mortgagee as a purchaser, within the meaning of the recording law, because by putting his mortgage on record he will gain priority over a previous unrecorded mortgage, of which he had no notice at the time he took his mortgage.[5]

But the registry, or record of a mortgage, is only notice to the extent of the sum specified therein.[6] Thus, where a mortgage was given to secure three *thousand* dollars, but by the mistake of the clerk was registered for three *hundred* dollars, it was held to be notice to subsequent bona fide purchasers to the extent only of the sum expressed in the registry.[7] On the same principle a prior mortgagee is not allowed to enlarge his demand beyond what appears upon the record, in consequence of a separate agreement between him and the mortgagor, to the prejudice of a second mortgagee, who had no notice or information, at the time he

[1] Evans v. Bicknell, 6 id. 183, 190. Barnett v. Weston, 12 Ves. 130. Berry v. Mut. Ins. Co. 2 J. Ch. R. 609, 610.

[2] Id.

[3] Per Savage, Ch. J. in James v. Mowry, 2 Cowen, 248.

[4] 1 R. S. 756, § 1.

[5] Berry v. Mut. Ins. Co. 2 J. Ch. R. 611.

[6] Beekman v. Frost, 1 id. 288. S. C. 18 J. R. 544, 564.

[7] Id.

took his mortgage, of the agreement between the mortgagor and the first mortgagee, by which the latter claimed interest, when the bond and mortgage were, on the face of them, without interest.[1]

We have hitherto treated of mortgages for existing debts or liabilities, or for the performance of covenants, and explained some of the general incidents of this security. It is obvious that occasions may arise, in the vicissitudes of business, which will render it expedient to obtain the security of a mortgage or judgment, for advances thereafter to be made, or for responsibilities thereafter to be incurred; or for general balances, which may be due from time to time. It has accordingly been held that this can be done. And it was suggested by the chancellor, in a recent case, that the security should be taken in a sum sufficiently large to cover the amount of the floating debt intended to be secured thereby.[2] And the supreme court held, many years ago, that a judgment may be entered as a security for future advances, beyond the amount then actually due.[3]

If a deed, absolute in terms, be intended as a mortgage, and it be shown by parol to be intended also as a security for future advances, it will, as between the parties, be treated as a mortgage, as well for the original debt, as for the subsequent advances.[4]

The extent to which a mortgage may be held as a security for future advances, as against subsequent bona fide purchasers and mortgagees without notice, has received the consideration of learned judges. In Gordon v. Graham, (cited in 7 Viner, 52, E. pl. 3, and in Powell on Mortg. 544,) it was held, by Lord Chancellor Cowper, that if a clause be contained in a mortgage, making it a security for future loans, subsequent loans will be taken as part of the original transaction, and paid before a second mortgage intervening, *with notice of the clause.* And Chancellor Kent intimated the opinion, that where a subsequent judgment or mortgage intervened, further advances *after that period* could not be covered.[5] If a mortgage be intended as a security for subsequent advances, it would seem to be the part of safety, that the agreement for such advances should appear upon the face of the security. Though without such clause, it would be good between the parties, as mortgagees or purchasers with notice, yet, if it be contained in the mortgage itself, the rec-

[1] St. Andrew's Church v. Tompkins, 7 J. Ch. R. 14. This subject was treated of to some extent, under the head of fraud. See ante, 253, 254.

[2] The Bank of Utica v. Finch, 3 Barb. Ch. R. 303.

[3] Livingston v. M'Inlay, 16 J. R. 165.

[4] James v. Mowry, 6 J. Ch. R. 429 S. C. 2 Cowen, 247.

[5] Brinkerhoff v. Marvin, 5 J. Ch. R. 327. James v. Johnson, 6 id. 429.

ord becomes notice to all the world of the extent and purpose of the security.[1] The principal is, that when actual notice is not brought home to the party, the record of the mortgage should give such reasonable notice, that the creditor may, by the inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance.[2]

The general doctrine is certainly well established, that property may be bound for future advances. It is frequent, said Marshall, Ch. J. on one occasion, for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due.[3] And the same doctrine was afterwards established by the same court, where a mortgage was held to secure a debt contracted afterwards, on account of prior advances or liabilities.[4] It was objected in the last mentioned case that the real transaction did not appear upon the face of the mortgage. The deed purported to secure a debt of thirty thousand pounds sterling, due to all the mortgagees. It was really intended to secure different sums due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. Upon this point Marshall, Ch. J. said that it is not to be denied that a deed, which misrepresents the transaction it recites, and the consideration on which it was executed, is liable to suspicion. It must sustain a vigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented, to deprive the person claiming under the deed, of his real equitable rights, *unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.*[5]

A mortgage given on the purchase of real estate, to secure the consideration money, has preference over any other lien existing against, or created by, the mortgagor. Hence, his widow is not entitled to dower as against the mortgagee,[6] though she is, as against all other persons.[7] On this principle, when the grantee, being indebted for the purchase money, conveyed and took from the purchaser two mortgages, and they were re

[1] 4 Kent's Com. 176. St. Andrew's Church v. Tompkins, 7 J. Ch. R. 14. Pettibone v. Griswold, 4 Conn. 158.

[2] Pettibone v. Griswold, 4 Conn. 158. Stoughton v. Pasco, 5 id. 442.

[3] United States v. Hoe, 3 Cranch, 73.

[4] Shirras v. Caig, 7 Cranch, 34.

[5] Id.

[6] Stow v. Tifft, 15 J. R. 458.

[7] Collins v. Torrey, 7 id. 278. Coles v Coles, 15 id. 319.

corded at the same time, and he assigned one of them to the grantor, to secure his unpaid purchase money, and afterwards assigned the other for value to a third person, it was held that the former was entitled to priority.[1]

The recording act gives priority to conveyances according to the order of time of their record, and they are considered as recorded from the time of their delivery to the clerk for that purpose.[2] Hence, where two mortgages are taken and recorded simultaneously, the recording acts have no application, and the priority must be determined by equitable rules.[3] So where a trustee or agent takes two mortgages on the same property at one time, for different *cestui que trusts*, or principals, the accidental recording of one before the other gives it no priority. So where two mortgages upon the same premises were recorded at the same time, and each mortgagee being cognizant of the giving the other mortgage when he took his own, the recording act has no application, and a court of equity will recognize an agreement or understanding of the parties that one should have priority, and will presume that it was delivered first.[5]

A judgment has no lien upon the real estate of the judgment debtor, until the judgment roll is signed and filed, nor has it any preference as against other judgment creditors, purchasers, or mortgagees, until the record thereof be filed and docketed.[6]

Previous to the Revised Statutes, a judgment in a court of record in this state was a lien upon the lands of the judgment debtor from the time of the entry of such judgment, whether docketed or not. But by the statute then in force, if the judgment was not properly docketed, it did not affect the lands of the judgment debtor as against subsequent purchasers or mortgagees.[7] Even as to them, however, the undocketed judgment was entitled to priority, in equity, if the purchaser or mortgagee had notice of its existence at the time of his purchase, or when he took his mortgage.[8] That statute made no provision for priority in favor of the lien of subsequent judgment creditors. The first judgment although not docketed, was therefore entitled to a preference over the lien of a junior judgment, which had been docketed as directed by the statute.

[1] Van Rensselaer v. Stafford, Hop. 569; affirmed on appeal, 9 Cowen, 316.

[2] 1 R. S. 756, § 1. Id. 760. § 24.

[3] Stafford v. Van Rensselaer, supra.

[4] Rhoades v. Canfield, 8 Paige, 545.

[5] Jones v. Phelps, 2 Barb. Ch. R. 440.

[6] 2 R. S. 360, § 12. Barrie v. Dana, 20 J. R. 307.

[7] 1 R. L. of 1813, p. 501, § 3.

[8] Buchan v. Sumner, 2 Barb. Ch. R. 193. Butler v. Lewis, 10 Wend. 544. Davis v. The Earl of Strathmore, 16 Ves. 420.

But if the land of the debtor had been sold by the sheriff, under an execution upon the junior judgment, to a purchaser who was ignorant of the existence of the prior undocketed judgment, such purchaser took the land discharged of the lien of the undocketed judgment.[1]

The Revised Statutes, however, made a very material alteration in the law relative to the liens of judgments. It is there enacted, that no judgment shall affect any lands, tenements, real estate or chattels real, or have any preference as against other judgment creditors, purchasers or mortgagees, until the record thereof shall be filed and docketed as therein directed.[2] The effect of this provision appears to be, to prevent the common law lien of the judgment from attaching at all upon the real estate of the judgment debtor until the judgment has been docketed; and not merely to protect bona fide purchasers and incumbrancers, who had no notice of the existence of the judgment when their interests in, or liens upon, the real estate of the judgment debtor accrued. The act of 1840 so far modified the Revised Statutes, as to require the judgment or decree, in order to create a lien upon real estate, to be docketed in the county where the lands are situated.[3] This is slightly altered by the code, which provides,[4] that on filing a judgment roll upon a judgment, directing in whole or in part the payment of money, it may be docketed with the clerk of the county, upon the filing with the clerk of the county where it was rendered, and in any other county, upon the filing with the clerk thereof, a transcript of the original docket, and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof, in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered.

A court of equity will enforce an equitable lien, either upon a legal or an equitable estate in lands. And when the common law, or a statute, creates a lien upon a legal interest in land, equity, by analogy, sometimes declares and enforces a similar lien upon an equitable estate. But when this lien is created by statute, and the lien itself, as well as the estate against which it is sought to be enforced, is purely legal, a court of equity is not authorized to extend the lien to cases not provided by the

[1] Buchan v. Sumner, 2 Barb. Ch. R. 194.

[2] 2 R. S. 360, § 12.

[3] Laws of 1840, p. 394, § 25.

[4] Code, § 282. Buchan v. Sumner 2 Barb. Ch. R. 194.

statute.[1] And it seems equity gives effect to the lien of a judgment as against subsequent purchasers and incumbrancers upon a legal title, only so far as the lien could have been enforced by execution at law. If, therefore, the judgment be one upon which interest cannot be levied upon the execution, although the judgment creditor may, in a suit upon the judgment, recover interest by way of damages, he is not entitled to a lien for the interest, but only for the amount of the judgment without interest.[2]

We have hitherto treated, in the main, of mortgages created by the express contract of the parties in writing, or of such as are created by a parol defeasance to a deed absolute in terms. It has long been settled in England, notwithstanding the statute of frauds, that a mere deposit of title deeds, upon an advance of money, gives an equitable lien[3] against a subsequent purchaser with notice;[4] and such deposit will cover future advances, if it appear by evidence that they were made upon the faith of the security.[5] The doctrine of equitable mortgages received its firmest support from Lord Thurlow, in Russell v. Russell, (supra.) In that case it was held, by his lordship, that a mere deposit of title deeds by a debtor, for the purpose of securing a sum of money, gave his creditor, in whose hands they were placed, an interest in the land to which they related, so as to enable him to file a bill for a sale. The principle on which the doctrine rests, is that a borrowing of money, on the deposit of title deeds as a pledge of repayment, is not within the statute of frauds. A court of law could not assist the borrower to recover back his title deeds; because to an action of trover it could be answered that the same were pledged for the payment of a sum of money, and that till the money was repaid, the party had no right to them. So, if the borrower came into equity for relief, he would be told that before he sought equity he must do equity, by repaying the money, in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages thus seems to have arisen from the necessity of the case.[6]

But this species of security has, notwithstanding, never been much favored, and Lord Eldon said, in one case, that nothing required to be

[1] Buchan v. Sumner, 2 Barb. Ch. R. 194.

[2] Mower v. Kip, 6 Paige, 91. Tunstall v. Trappes, 3 Sim. R. 299. De La Vergne v. Evertson, 1 Paige, 182. Mason v. Sudam, 2 J. Ch. R. 172, 180.

[3] Russell v. Russell, 1 Bro. C. C. 269. White's Eq. Cas. 440.

[4] Hiern v. Mill, 13 Ves. 114.

[5] Ex parte Langston, 17 id. 227. Ex parte Whitbread, 19 id. 209. Ex parte Kensington, 2 Ves. & B. 79.

[6] Keyes v. Williams, 3 Younge & C. 55, 61, per Lord Abinger.

watched with more jealousy than this doctrine of lien by the deposit of deeds; especially when the inference contradicts a written instrument.[1] And in an earlier case[2] he said: "I remember previously to Russell v. Russell it was very much doubted whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose; resting altogether upon parol; and it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards, from favor to that creditor, to say, they were deposited with him for the purpose of securing his debt; and so all the perjury the statute of frauds meant to avoid is introduced, and the rule changed. But Lord Thurlow was of opinion, and that is not now to be disturbed, that the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact, that entitled the court to give an interest." On several other occasions Lord Elden strongly disapproved of the case of Russell v. Russell, but it has nevertheless been constantly acted upon and recognized in England as a binding authority.[3]

The doctrine of equitable mortgage, by the deposit of title deeds in the hand of the lender of money, has been repeatedly recognized in this state, though not permitted to be set up at law as a legal estate.[4] In one case, in the absence of other proof, evidence of an advance of money, and the finding of the title deeds of the borrower in the possession of the lender, were held sufficient to establish an equitable mortgage; and the assistant vice chancellor approved the remarks of Lord Eldon, in Ex parte Kensington, already cited, where he says, "it has been so long settled that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, that whatever I might have thought originally, I must act upon that as settled law."

But though an equitable mortgage be good between the parties, and as against a subsequent mortgagee with notice, yet it will be postponed in favor of a purchaser, or mortgagee who had no notice of the equitable lien, and who have recorded their conveyances; for the equities being equal, the law must prevail.[5] In most of the cases of equitable mort-

[1] Ex parte Coombe, 17 Ves. 370.

[2] Ex parte Corning, 9 id. 117.

[3] Ex parte Wetherell, 11 Ves. 398. Ex parte Haigh, id. 403. Ex parte Mountford, 14 id. 606. Ex parte Kensington, 2 V. & B. 79. Ex parte Hooper, 1 Meriv. 9. Ex parte Warner, 19 Ves. 202. Winter v. Lord Anson, 3 Russ. 493. Whitbread v. Jordon, 1 Y. & C. Exch. Cas. 303. Tylee v. Webb, 6 Beavan, 552.

[4] Jackson v. Parkhurst 4 Wend. 369, 376. Jackson v. Dunlap, 1 J. C. 114. Berry v. Mut. Ins. Co. 2 J. Ch. R. 603. Parkist v. Alexander, 1 id. 394. Rockwell v. Hobby, 2 Sandf. Ch. R. 9.

[5] Heirn v. Mill, 13 Ves. 114. Plumb v. Flewitt, 2 Anst. 432.

gages which have been upheld by the courts, they have been created on the advance of money, or as security for money thereafter to be advanced and not as a security for antecedent indebtedness, not originating on the faith of the security. Though the latter may be good between the parties, they probably cannot be upheld against subsequent incumbrancers without notice, unless it be against judgments whose liens are general.

In one case, an agreement to give a mortgage for antecedent indebtedness was held to create a specific lien, and was preferred to the assignees of the equitable mortgagor and his general creditors.[1] And so where there is an incomplete agreement for a mortgage, Lord Loughborough said the court, after the death of the party, and all his engagements are to be arranged, has given a *specific* lien. This doctrine was evidently approved by the chancellor, in the Matter of Howe, (supra.) General assignees for the benefit of creditors, created by the voluntary act of the debtor, cannot be considered as bona fide purchasers. Judgment creditors have no preference over prior equitable claims against the estate of the debtor. And hence a contract for a mortgage, or for the sale of real estate, has been preferred to judgments recovered subsequent to the contract. And an agreement for a mortgage is, in equity, a specific lien upon the land.[2]

It has been held, at law, that a legal tender of the money due on the bond and mortgage, made to the mortgagee or his assignees, or his attorney, accompanied by a refusal, discharges the land from the lien of the mortgage, though the debt still remains.[3] And though the tender be not at the day, but at some day subsequent, but before foreclosure, the same consequences have been said to follow.[4] But in equity, a tender, unless made at the day, does not turn what was before an equity of redemption into an absolute estate discharged of the lien of the mortgage money, which remains unpaid. But a tender of the money on the day it becomes due is a compliance with the condition, and by the terms of the mortgage divests the whole interest or estate of the mortgagee in the premises.[5] If the money be not paid at the day, the condition is broken, and the interest of the mortgagor in the land is then reduced to a mere equity of redemption. An actual payment, and not a mere tender, then becomes necessary to

[1] Burn v. Burn, 3 Ves. jr. 576, 582. Case of Sir Simon Stuart, cited by counsel and court; and in matter of Howe, 1 Paige, 128.

[2] In the matter of Howe, 1 Paige, 125.

[3] Jackson v. Craft, 18 J. R. 110.

[4] Farmers' Fire Ins. Co. v. Edwards, 21 Wend. 467. S. C. 26 Wend. 541.

[5] Merrit v. Lambert, 7 Paige, 344. Arnot v. Post, 2 Denio, 344. Burnett v. Dennison, 5 J. Ch. R. 35.

discharge the legal and equitable lien of the mortgage upon the land. Indeed, at common law, the actual payment of the mortgage money and interest, after the day, was not sufficient to revest the legal title in the mortgagor or his assignees; but a reconveyance of the premises was necessary. And it is for these reasons that a bill to redeem becomes necessary when the mortgagee, after forfeiture, refuses to receive what is justly due.[1]

Analogous to an equitable mortgage, in some respects, is the lien of the vendor of real estate, for the whole or a part of the purchase money, where there is no special agreement that the lien shall not be reserved.[2] Prima facie the unpaid purchase money is a lien on the land, and it lies on the purchaser to show that the vendor agreed to rest on other security, and to discharge the lands. The death of the vendee does not alter the claim, for the heir cannot be permitted to hold what his ancestor unconscientiously obtained. And a thing is unconscientiously obtained when the consideration is not paid.[3]

Nor is the taking of the negotiable note of the vendee a discharge of the lien. And if a part of the purchase money be paid the lien is good as to the residue, and the vendee becomesa trustee as to that which is unpaid.[4]

But if security be taken for the purchase money, upon the land, or in any way, the lien is waived unless there be an express agreement retaining it.[5] So the lien is waived when a note or bond is taken of the vendee for the purchase money, in which a third person joins as security.[6]

This lien continues to exist against subsequent purchasers and incumbrancers, when they advance no new consideration, or had notice of the lien at or before their purchase.[7] But it is divested by a sale to a bona fide purchaser without notice.[8] It is superior to the lien of a prior judgment against the vendee.[9]

With respect to the mode of enforcing a lien for purchase money, the remedy is in equity; and although an action at law can be sustained, yet a court of law cannot grant the relief which is adapted to the necessity of the case. The party holding the lien is not bound to exhaust his remedy at law, but may come into equity in the first instance.[10]

This equitable lien is not lost or waived, even though the vendor,

[1] Merrit v. Lambert, supra.

[2] Nairn v. Prouse, 6 Ves. 752, 760. Hughs v. Kearny, 1 Sch. & Lefr. 132.

[3] Id. Garson v. Green, 1 J. Ch. R. 309. Clark v. Hall, 7 Paige, 383.

[4] Garson v. Green, supra. Hallock v. Smith, 3 Barb. S. C. R. 276. Blackburn v. Grayson, 1 Bro. C. C. 420.

[5] Fish v. Howland, 1 Paige, 20.

[6] Id.

[7] Hallock v. Smith, 3 Barb. S. C. R. 267.

[8] Fish v. Howland, 1 Paige, 20.

[9] Arnold v. Patrick, 6 Paige, 310.

[10] Bradley v. Bosley, 1 Barb. Ch. R. 152

through the fraud of the vendee, supposes himself fully paid. Thus, if upon the sale of a farm, the purchaser should pay for half of it in good money, and for the other half in the worthless bills of a broken and insolvent bank, from which nothing could be obtained, the vendee fraudulently representing such bills to be good and collectable, the vendor would have the right to elect either to rescind the sale, and have a reconveyance of the land, or to charge the land itself with the half of the purchase money which remained unpaid, as an equitable lien upon such land.[1]

But this equitable lien for the purchase money does not exist in favor of a person who indorses a note for the maker, to enable him to purchase land, and who accordingly transfers the note to the vendor in part payment, and the indorser is compelled to pay it. The transaction of itself imports a reliance on the personal liability of the maker, and does not imply an agreement for a lien.[2] It might be otherwise, if the note was indorsed upon the faith of an agreement between the purchaser and the indorser, that the note should be transferred to the vendor in payment of the purchase money. In such case there would be an equity in favor of the indorser, if compelled to pay the note, that he should be in as good plight with respect to security as the vendor himself.[3]

This doctrine of lien for the purchase money, says Lord Eldon, is probably derived from the civil law as to goods, which goes further than our law; by which, though the right of stoppage *in transitu* is founded in natural justice and equity, yet if possession, either actual or constructive, was taken by the vendee, the lien was gone.[4]

With respect to the interest of the mortgagee, before foreclosure, it was long well settled that it was in equity a chattel interest, and personal assets, and went to the executor.[5] This question at law depended on the fact, whether the mortgage was in fee or for years; in the former case, the legal estate went to the heir; in the latter, to the executor. But with regard to the money due upon the mortgage, it is fully established in equity, that in every case it is to be paid to the executor or administrator of the mortgagee; by reason of the rule in equity, that the satisfaction shall accrue to the fund that sustained the loss.[6] Doubts seem to have existed at one time on this head, in cases in which the mortgage was in fee, and there was neither bond, or covenant for payment of the

[1] Bradley v. Bosley, 1 Barb. Ch. R. 152.
[2] M'Kay v. Green, 3 J. Ch. R. 58. Mackreth v. Symons, 15 Ves. 354. id. 342.
[3] Tabor v. Grover, 2 Vern. 367. Audley v. Audley, id. 193. Demarest v. Wynkoop, 3 J. Ch. R. 135.
[4] Winn v. Littleton, 2 Ch. Cas. 51. S. C. 1 Vern. 3. Tabor v. Tabor, 3 Swanst. 636.

money; or where the consideration for redemption was upon payment to the mortgagee, his heirs or executors;[1] but the law is now clearly settled, that whatever be the form of the mortgage, it will be part of the personal estate of the mortgagee. Consequently, if the mortgage be in fee, the heir or devisee of the mortgagee will be a trustee of the land for the executor or administrator; and will, upon application, be directed to convey to him.[2] But in this state it has been shown, that the mortgage has been treated as a security for a debt, and that the estate in the land, for most purposes, remained in the mortgagor until foreclosure. And the Revised Statutes have expressly declared, that the mortgage shall be deemed assets in the hands of the personal representatives of the mortgagee.[3] A mortgage is not considered a conveyance of land within the statute of frauds, and it may be assigned by mere delivery.[4] Even if the assignment be in writing, as is most usual, and be recorded, it is not in itself notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee.[5] The assignee, whether in writing or by parol, should, for his own protection, give notice thereof to the mortgagor, or other party bound to pay it.[6]

The assignee of a bond and mortgage takes them subject to all the equities of the original mortgagor, but not to the latent equity of a third person.[7]

With respect to the rights and duties of a mortgagee in possession, it may be stated, in general, that he is liable to account for the rents and profits of the estate, and to surrender up the possession when the debt is satisfied. He may pay off a senior incumbrance, and on a bill filed to foreclose, and to be reimbursed the sum he has paid, he is entitled to a decree of indemnity out of the proceeds of the sale of the mortgaged premises.[8] And when a satisfaction of a senior mortgage would not be as beneficial to the plaintiff as an assignment thereof, he may file a bill in equity against the holder of such senior mortgage, and compel an assign-

[1] Coote on Mortgages, 529.

[2] Demarest v. Wynkoop, 3 J. Ch. R. 145. Ellis v. Graves, 2 Ch. Cases, 50.

[3] 2 R. S. 83, § 6, subd. 8.

[4] Runyan v. Mersereau, 11 J. R. 534.

[5] 1 R. S. 763, § 41. James v. Mowry, 2 Cowen, 246.

[6] Id.

[7] Evans v Ellis, 5 Denio, 640. 11 Paige, 467, S. C. Murray v. Livingston, 2 J. Ch. R. 441. Livingston v. Dean, id. 479. James v. Mowry, 2 Cowen, 246. Pendleton v. Fay, 2 Paige, 202. Evertson v. Evertson, 5 id. 644. L'Amoureux v. Vandenburgh, 7 id. 316.

[8] Dale v. M'Evers, 2 Cowen, 119. Finch v. Brown, 3 Beavan, 70. Wilson v. Chier, id. 126.

ment of the same to himself, after tendering the amount due and demanding an assignment.[1]

A mortgagee in possession is entitled to an allowance for necessary repairs, to be allowed in stating his account for the rents and profits. He may be allowed for money expended in supporting the title of the mortgagor, when it has been assailed. But he is allowed nothing for his trouble in receiving the rents and profits of the estate. So where a mortgagee entered and cleared up wild land, the expense of doing so was not allowed him, though the estate was probably increased in value. To make such an allowance, it was said, would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not.[2] The precedent would be liable to abuse, and would be increasing the difficulties in the way of the right of redemption. Many a debtor, said the chancellor, in the same case, may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements, which the mortgagee had been able and willing to make. The English courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt.[3] The older and the modern English cases speak a uniform language on this subject.[4]

The mortgagee, however, is not bound to account for the proceeds of improvements made by himself.[5]

In some of the states there are statutory regulations on this subject, which modify the rules which have been laid down.

Taxes are a legal charge upon the estate, and if necessarily paid by the mortgagee, may be added to the mortgage debt; but it is otherwise of payments for insurances effected by the mortgagee, unless by special agreement with the mortgagor.[6] So money paid by the mortgagee, to redeem the premises from a tax sale, become part of the mortgage debt in equity.[7]

With respect to the mortgagor, he was treated at law as tenant at will of the mortgagee, and was liable to be turned out of possession by an ejectment, without even a notice to quit. In this state, the courts held, at an early day, before an ejectment for a mortgagee was abolished, that a notice to quit was necessary, as in other cases of tenancy.[8] But as

[1] Pardee v. Van Anken, 3 Barb. S. C. R. 534.

[2] Moore v. Cable, 1 J. Ch. R. 387, 388.

[3] Id.

[4] French v. Bacon, 2 Atk. 120. Godfrey v. Watson, 3 id. 517. Bonethorn v. Hockmore, 1 Vern. 316. Sandon v. Hooper, 6 Beavan, 246.

[5] Moore v. Cable, 1 J. Ch. R. 385 Bell v. Mayor of N. Y. 10 Paige, 49

[6] Faure v. Winans, Hopk. 283.

[7] Burr v. Veeder, 3 Wend. 412.

[8] Jackson v. Laughhead, 2 J. R. 75. Jackson v. Green, 4 id. 186.

against all persons but the mortgagee he was treated, even at law, while he remained in possession, as the beneficial owner of the estate. He is permitted to receive the rents and profits of the estate. His estate is liable to be sold on execution against him. It is liable to the dower of the wife, and the curtesy of the husband.[1] Both the mortgagee and mortgagor are treated in equity as trustees, and neither will be permitted, while in possession of the estate, to do any act which will essentially injure the rights of the other party. It has been shown under the head of injunction, that both will be restrained from the commission of waste.[2]

With respect to the remedies which the law affords upon mortgages, it may be observed, in the first place, that the right of redemption by the mortgagor or his representatives is incident to every mortgage, and that the courts look with jealousy on all attempts to impair or embarrass the exercise of it.[3] This remedy can be asserted only in a court of equity, for at law the estate becomes absolute on failure to pay at the day. Nor is the right of redemption confined to the mortgagor, his heirs, executors, administrators, or assigns, or subsequent incumbrancers. It extends to all persons claiming any subsisting interest whatever in the premises as against the mortgagor.[4] A purchaser of lands at a sheriff's sale is entitled to redeem a prior mortgage.[5] A subsequent judgment creditor is entitled to redeem.[6] So a junior mortgagee is entitled to redeem a prior mortgage, if due, and to an assignment on redeeming.[7] So a junior incumbrancer, who was not made a party to the suit for foreclosure, is not bound by the decree, and may thereafter redeem.[8] But if a junior judgment creditor purchase on a statute foreclosure, and then conveys with warranty, his right to redeem is extinguished. The effect of a statute foreclosure is to transfer to the purchaser the rights of the mortgagee, so far as he has any claim or interest in the mortgaged premises, for the security of his debt, and also to transfer to him so much of the equity of redemption as was not bound by the lien of a junior judgment or mortgage.[9] Creditors, by judgment or mortgage, whose liens attach

[1] See Ante.

[2] Brady v. Waldron, 2 J. Ch. R. 148.

[3] Holdridge v. Gillespie, 2 id. 30. Henry v. Davis, 7 id. 40. S. C. on appeal, 2 Cowen, 324. 2 Fonb. Eq. B. 3, ch. 1, § 8. Id. § 2.

[4] Grant v. Duane, 9 J. R. 591.

[5] Matter of Scrugham, Hopk. 88.

[6] Burnet v. Dennison, 5 J. Ch. R. 35, 40.

[7] Pardee v. Van Anken, 3 Barb. S. C. R. 534.

[8] Haines v. Beach, 3 J. Ch. R. 459

[9] Vroom v. Ditmas, 4 Paige, 531

intermediate a prior mortgage and a statute foreclosure of it, may redeem.[1]

If the mortgage be by absolute deed, with a parol agreement that it shall stand as security, one acquiring title under a judgment against the mortgagor may redeem.[2] And he may so redeem against the mortgagee, or his heirs, or personal representatives.[3] But if the mortgagee, by a deed absolute on its face, sell to a *bona fide* purchaser and receives the purchase money, the mortgagor's remedy is against the mortgagee, and he cannot redeem. The *bona fide* purchasers who have actually paid the purchase money, without notice of the equitable rights of the mortgagor, cannot be disturbed.[4]

A sale, or lease of part of the premises, by the mortgagee, before foreclosure, does not affect or prejudice the mortgagor's right of redemption, nor deprive the mortgagee of the right to foreclose.[5]

With regard to the amount to be paid on redeeming, it may be said, that as taxes are a legal charge upon the estate, they may, if necessarily paid by the mortgagee, be added to the mortgage debt.[6] But as the English doctrine of tacking is superseded by our recording laws, a prior mortgagee who acquires the equity of redemption, or a judgment subsequent to a second mortgage, cannot compel the second mortgagee, on redeeming, to pay the judgment as well as his mortgage.[7] Nor can a prior mortgagee enlarge his demand beyond what appears upon the record, in consequence of a separate agreement with the mortgagor, to the prejudice of a subsequent mortgagee, without notice of the agreement.[8] Nor can a mortgagee, as against subsequent *bona fide* grantees or incumbrancers, hold his mortgage as a lien for another distinct debt, upon parol proof that it was intended to cover that also.[9] In general, however, prior incumbrances must be paid off by a party coming to redeem, according to their priorities; and the party coming to redeem must pay the costs of the suit.[10] But a mortgagee may so conduct as not only to forfeit his right to costs, but as to subject himself to the costs of the other party.[11]

[1] Benedict v. Gilman, 4 Paige 58. Vroom v. Ditmas, id, 526.

[2] Van Buren v. Olmstead, 5 Paige, 9.

[3] Id.

[4] Whittick v. Kane, 1 Paige, 202.

[5] Wilson v. Troup, 7 Ch. R. 25.

[6] Faure v. Winans, Hopk. 283. Burr v. Veeder, 3 Wend. 412. Rapelye v. Prince, 4 Hill, 119.

[7] M'Kinstry v. Marvin, 3 J. Ch. R. 466.

[8] St. Andrews Church v. Tompkins, 7 J. Ch. R. 14.

[9] The Bank of Utica v. Finch, 3 Barb. Ch. R. 293.

[10] Benedict v. Gilman, 4 Paige, 58.

[11] Brockway v. Wells, 1 Paige, 191. Detillan v. Gale, 7 Ves. 583. Slee v. Manhattan Co. 1 Paige, 48. Henry v Davis, 7 J. Ch. R. 40.

A judgment creditor, redeeming premises after statute foreclosure, is not bound to pay the costs of such foreclosure. The amount he is to pay does not depend on the sum bid at the sale by the mortgagee at such statute foreclosure, but on the amount actually due at the time of such sale, unless it has been subsequently paid by the person who was equitably bound to pay it.[1]

With regard to the remedies of the mortgagee to enforce payment of the mortgage money, where the same was secured also by a bond, note, or personal covenant, the rule formerly was that the creditor had three remedies, all or either of which he might pursue until his debt was satisfied. He might bring an action at law on the bond, note or covenant, get possession of the rents and profits of the land mortgaged, by an ejectment, or foreclose the equity of redemption, and sell the land to pay the debt, by a bill in chancery.[2] And these remedies might all be pursued at the same time.

But now by statute in this state, no action of ejectment can be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises.[3] The object of the law was to compel the mortgagee to resort to equity to enforce his security, and to prevent the unnecessary multiplicity of suits.[4] The party may, however, bring a personal action to recover the mortgage debt, but he cannot sell, under his execution, issued upon the judgment, for such debt, the equity of redemption of the mortgagor, his heirs or assigns.[5]

In an action for the foreclosure or satisfaction of a mortgage, the court is empowered to decree a sale of the mortgaged premises, or of such part as may be sufficient to discharge the amount due on the mortgage, and the costs of suit.[6] And when the action is for the satisfaction of a mortgage, the court has not only power to decree and compel the deliverance of the possession of the mortgaged premises to the purchaser thereof, but, on the coming in of the report of sale, it has also power to decree and direct the payment, by the mortgagor, of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the case, in which such balance is recoverable at law; and, for that purpose, may issue the necessary executions, as in other cases, against the property of the mortgagor, or against his person, in cases where it is lia-

[1] Benedict v. Gilman, 4 Paige, 58.

[2] Jackson v. Hull, 10 J. R. 481. Dunkley v. Van Buren, 3 J. Ch. R. 330. Jones v. Conde, 6 id. 77. Hughs v. Edwards, 9 Wheat. 489.

[3] 2 R. S. 312, § 57.

[4] See notes of Revisers, 3 R. S. 673. 2 R. S. 368, § 31; and see Tice v. Annin, 2 J. Ch. R. 125.

[5] 2 R. S. 191, § 151.

ble to imprisonment.[1] After the commencement of an action in equity, and while the same is pending, and after a decree rendered therein, no proceedings whatever could be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.[2] The practice in foreclosure actions does not fall within the scope of this treatise, and will be found at large in books devoted to that subject.

A summary mode of foreclosing mortgages at law, by advertisement and sale, is provided by statute for those cases, where the mortgage contains a power to the mortgagee, or any other person, to sell the mortgaged premises, upon default being made in any condition of the mortgage.[3] The description of this remedy belongs to treatises on the practice at law. There are many cases where this remedy cannot be applied,[4] and there are none in which it supersedes an action in a court of equity. The latter, therefore, is with us the most usual, as well as the most effective remedy, in cases of non-payment of demands secured by mortgage.

There are two modes of foreclosing mortgages in equity; the one is called a strict foreclosure, where by the decree the equity of the mortgagor, and of those claiming under him, in the *post*, is barred, and the complete title is vested in the mortgagee;[5] the other is the ordinary foreclosure and sale, where the premises are directed to be sold to pay the debt and costs, and the surplus to be returned to the mortgagor or his personal representatives or assigns. A strict foreclosure of the mortgaged premises does not *per se* operate as an extinguishment of the debt. It does not produce that effect, unless the lands mortgaged were of sufficient value to pay the debt.[6] Consequently, after a strict foreclosure, the mortgagee may resort to the bond, if one was taken with the mortgage, and a plea of strict foreclosure will be no answer to the action, unless it be averred that the land was equal in value to the amount of the debt.[7]

If the mortgage is the only security for the debt, and the mortgagor is

[1] 2 R. S. 191, § 152. See Non-imprisonment Act of 1831, p. 396. M'Carthy v. Graham, 8 Paige, 480.

[2] 2 R. S. 191, § 153.

[3] 2 R. S. 545.

[4] See Ferguson v. Kimball, 3 Barb. Ch. R. 616. S. C. 2 Comst. 360.

[5] Perine v. Dunn, 4 J. Ch. R. 140, 143. Buckman v. Astor, 9 Paige, 520.

[6] Spencer v. Harford, 4 Wend. 385.

[7] Id. Hatch v. White, 2 Gallison, 152. The Globe Ins. Co. v. Lansing, 5 Cowen, 380. Lansing v. Goelet, 9 id. 346, 402. Dunkley v. Van Buren, 3 J. Ch. R. 330. See the elaborate opinion of Jones, chancellor, in the court of errors, in Lansing v. Goelet, 9 Cowen, 348 et seq. on the history and practice of foreclosure in this state.

not personally bound for the payment of it, as sometimes is the case, the only remedy of the mortgagee, for the recovery of his demand, is to take the estate for the debt, on the mortgagor's failing to redeem when called on in equity for that purpose.

Upon a strict foreclosure of a mortgage, if the value of the land be equal to the debt, the debt is paid.[2]

The practice of the court of chancery in England, on the foreclosure of mortgages upon estates in possession, allows the creditor to proceed at law, after the decree of foreclosure, upon the bond or personal contract of the mortgagor, for the recovery of the debt. But, in such case, if the creditor so elects to pursue his personal remedy, he waives the benefit of his decree of foreclosure, and reinstates the mortgagor in his right to redeem the estate. He cannot at the same time retain the estate, which has become absolute in him by the foreclosure, and recover the debt, which is the consideration of that estate, by an action on the bond.[3] But the practice in this state has been different. We have always treated the mortgage as a security for the debt. And on a decree of foreclosure, when there was a personal contract to pay the debt, directed a sale of the premises, and the application of the purchase money to the satisfaction of the decree; and if a balance of the debt remained unpaid, allowed the creditor to resort to the bond or other contract for the payment of the money for the deficiency, without opening the foreclosure.[1]

The principle on which the subsequent action on the bond was held in England to open the previous decree of foreclosure, does not apply to decrees of foreclosure and sale. The principle is, that the mortgagee who obtains a decree of foreclosure must be deemed, as long as he holds under it, to take the estate for the debt; and if he afterwards proceeds, as he may do, on his bond for the recovery of the debt, he must be deemed to waive his decree, and let in the mortgagor to the right of redemption.[5] But that rule does not apply in the case of a judicial sale. The object of the sale is to convert the estate into money, to be applied to the payment of the debt. And when the proceeds are thus applied, the whole or some portion of the debt, equal to the avails of the mortgaged premises, is satisfied. The mortgagor has thus obtained the benefit of it by the application of the purchase money to the payment or reduction of the debt.

[1] Per Jones, Ch., in Lansing v. Goelet, 9 Cowen, 352.

[2] Morgan v. Plumb, 9 Wend. 292. Spencer v. Harford, 4 id. 385.

[3] Per Jones, Ch., in Lansing v. Goelet, 9 Cowen, 381. 1 Mad. Ch. Pr. 421. Dashwood v. Blithway, Eq. Cases Abr 317. Perry v. Baker, 8 Ves. 528. 13 id. 198.

[4] 9 Cowen, 346, 382.

[5] Per Jones, in Lansing v. Goelet, 9 Cowen, 368.

If the proceeds are insufficient to satisfy the debt, and a bond or personal covenant was given with the mortgagor, the mortgage remains liable for the deficiency; and he cannot complain, upon being called upon to pay it; and upon no principle of equity can he be permitted for that cause to disturb the sale, or reclaim the premises from the purchaser.

The doctrine seems to have been, in this state, prior to the Revised Statutes of 1830, that on a decree of strict foreclosure, if the premises mortgaged were of less value than the debt, and the mortgagor had given a bond, note or covenant to pay the money, to hold him liable at law for the deficiency, without opening the decree of foreclosure. In case of a decree of foreclosure and sale, or of a sale without a foreclosure, if the proceeds of the sale were insufficient to pay the debt, the mortgagor was liable for the deficiency at law, and the proceeding to enforce the collection of the balance did not affect the previous sale, or let in the mortgagor to redeem. And thus a strict foreclosure did not extinguish the debt, except in cases where there was no personal agreement of the mortgagor to pay the debt, or the mortgaged premises were at least equal in value to the amount of the debt.[1]

The object of the Revised Statutes was, in part, to adopt the decisions of the courts, and thus declare the power of the court, on a bill for a foreclosure or a satisfaction of a mortgage, whether the defendant appear or not; to decree a sale of the mortgaged premises, or such part thereof as might be sufficient to discharge the amount due on the mortgage, and the costs of suit; and in case of a deficiency, when the balance was recoverable at law, to decree and direct the payment of the balance by the mortgagor, and to issue the necessary process for these purposes.[2] Hence the aid of a court of law became unnecessary, after the party had commenced his action in equity, and could not be resorted to unless authorized by the court of chancery.[3] The same principles are applicable under the code, and a single action will enable the mortgagee to foreclose his mortgage, and obtain a judgment for the balance of the debt, if any, against any party who is liable therefor. For though these were formerly separate causes of action, the one equitable and the other legal, they both arise out of the same transaction, and may properly be

[1] Lansing v. Goelet, 9 Cowen 346. Spencer v. Harford, 4 Wend. 381. Morgan v. Plumb, 9 id. 286. Lansing v. The Albany Ins. Co. Hopkins, 102. Ludlow v. Lansing, id. 231. Sedgwick v. Fish, id. 594. Perine v. Dunn, 3 J. Ch. R. 508. Campbell v. Macomb, 4 id. 534. Kershaw v. Thompson, id. 609. Delabigarre v. Bush, 4 J. R. 480. Perine v. Dunn, 4 J. Ch. R. 140. Globe Ins. Co. v. Lansing, 5 Cowen 380.

[2] 2 R. S. 191, §§ 151, 152. Revisers' notes, 3 R. S. 673.

[3] 2 id. 191, § 153. M'Carty v. Graham, 8 Paige, 480. The Bank of Rochester v. Emerson, 10 id. 115.

united.[1] And, in truth, they have been so united in bills of foreclosure, since the adoption of the Revised Statutes in 1830.

The mode of foreclosing mortgages, and of redeeming mortgaged premises, is regulated in most of the states, in a great measure, by statute, and it is not proposed to collect the decisions which have been made by their courts concerning them. The foundation of the jurisdiction is in all cases derived from the English practice.

On the foreclosure and sale of mortgaged premises, and in the distribution of the surplus money, there are often important questions as to the *primary fund* for the payment of the mortgage debt, and as to *the order* in which lands charged with various liens shall be sold, and the avails *distributed.* Courts of equity settle these questions upon broad and comprehensive principles. The equities of successive incumbrances are often adjusted in decrees for foreclosure and sale, without any bill to marshal securities. The same object is often accomplished by prescribing the order of sale, or directing the distribution of the surplus, after the report of sale has been confirmed.

If no equitable circumstances intervene, the debt is considered the principal, and the mortgage the security; and consequently, on the death of the mortgagor, his personal representatives are bound, as between them and the heir, to pay off the mortgage.[2] But when the land is expressly conveyed, subject to a mortgage thereon, the land is the primary fund, as between grantor and grantee, and those deriving title from the grantee, for the payment of the mortgage debt.[3] So the purchaser of an equity of redemption, under a junior judgment, or mortgage, takes the land subject to the prior mortgage, and the land becomes the primary fund for the payment.[4] By purchasing subject to the prior mortgage expressly, he is presumed to bid only to the value of the equity, subject to the payment of the prior mortgage thereon. And if he then takes an assignment of the prior bond and mortgage, he cannot charge the mortgagor, by a suit on the bond, until he has exhausted his remedy upon the mortgage.[5] On the same principle, when a mortgagor sells a part of the land, subject to the whole mortgage, the part sold is primarily liable for the mortgage debt, and the personal estate of the deceased grantee is liable only for the deficiency.[6] And so when tenants in common mortgage

[1] Code, § 167.

[2] 2 Williams' Ex. 1043.

[3] Jumel v. Jumel, 7 Paige, 591.

[4] Tice v. Annin, 2 J. Ch. R. 125. M'Kinstry v. Curtis, 10 Paige, 503. Russell v. Allen, 10 Paige, 249. Vanderkemp v. Shelton, 11 id. 28.

[5] Vanderkemp v. Shelton, 11 Paige, 28. Mathews v. Aikin, 1 Comst. 595.

[6] Halsey v. Reed, 9 Paige, 446.

for a joint debt, and afterwards make partition, each half is chargeable primarily with one half of the debt and costs.[1]

But the rights and equities of the parties are sometimes as much affected by the *order* in which separate incumbered pieces of land are sold, as by the determination as to which is the *primary*, and which the *auxiliary* fund. Courts of equity, while they will preserve the rights of the creditor, require them to be so exercised as not injuriously to disturb the rights and equities of others. Thus, when a creditor has a lien upon several parcels of land for the payment of his debt, and some of the lands still belong to the person who in equity ought to pay and discharge the debt, and other parcels have been sold by him, the lands still belonging to such person are in equity first chargeable with the payment of the debt. And upon the principle that as between equal equities, he who is prior in time is strongest in right, if the person who ought to pay the debt has conveyed different parcels of the land, upon which it is a lien, at several times to bona fide purchasers; as between such purchasers, the lands are chargeable in equity in the inverse order of their alienation.[2] That is to say, the lands last sold are to be first charged, and so on in successive inverse order.

On the same principle, when there are general liens upon the whole land, and subsequent mortgages on the parcels, the general liens are primarily chargeable on the parcels, in the inverse order of their being mortgaged.[3] In like manner, when mortgaged premises are sold, subsequent to the date of the mortgage, to different purchasers, such parcels, upon a foreclosure of the mortgage, are to be sold in the inverse order of their alienation, according to the equitable rights of the different purchasers as between themselves.[4]

This principle is not confined to the original alienations of the mortgagor, but extends to conveyances by his grantee, where he conveys with warranty.[5] It is applicable to subsequent incumbrances, upon different parcels of the mortgaged premises, either by mortgage or judgment.[6]

So where the lands are mortgaged, and a part thereof subsequently sold by the mortgagor, the part remaining unsold is the primary fund for

[1] Rathbone v. Clark, 9 Paige, 648.

[2] Skeel v. Spraker, 8 Paige, 182. Gill v. Lyon, 1 J. Ch. R. 447. Clowes v. Dickinson, 5 id. 235. Gouverneur v. Lynch, 2 Paige, 300. Guion v. Knapp, 6 id. 35. Stoney v. Shultz, 1 Hill's Ch. R. 500. Rathbone v. Clark, 9 Paige, 648. Schryver v. Teller, id. 173.

[3] Schryver v. Teller, 9 Paige, 173.

[4] Guion v. Knapp, 6 id. 35. Snyder v Stafford, 11 id. 71. The N. Y. Life Ins. and T. Co. v. Milnor, 1 Barb. Ch. R. 353. Stuyvesant v. Hall, 2 id. 151.

[5] Guion v. Knapp, 6 Paige, 35.

[6] Stuyvesant v. Hall, 2 Barb. Ch. R 151.

the payment of the mortgage debt; and if different parcels are sold, they should be charged with the debt in the inverse order of alienation. In like manner, where lands are contracted to be sold, and the purchaser contracts to sell a part of such lands, the part remaining is the primary fund for the payment of the original purchase money; and if the original purchaser transfers different interests, they are chargeable in the inverse order of alienation.[1]

The right to have the lands which have been sold by the mortgagor, charged in the inverse order of their alienation, is not strictly a legal but an equitable right; and is governed by those equitable principles upon which courts of equity protect the rights of sureties, or those who are standing in the situation of sureties.[2] And the conscience of the party who holds the incumbrance is not affected, unless he is informed of the existence of the facts upon which this equitable right depends; or he has a sufficient notice of the probable existence of the right, to make it his duty to inquire, for the purpose of ascertaining whether such equitable right does in fact exist.[3]

With respect to the surplus money, in case the mortgaged premises sell for more than enough to satisfy the amount due on the mortgage, the mortgagor or his grantees are, prima facie, entitled to it.[4] The incumbrances subsequent to the mortgage under which the sale is had, must be paid off in the order of time in which their respective liens attached.[5] And though, in general, the court is not bound to take notice of any interest acquired by purchasers, in the subject matter of the suit, *pending the suit*, yet a person who obtained a judgment against a mortgagor, pending the suit, by the mortgagee for foreclosure, and prior to the decree, was allowed to redeem, as against the purchaser at the master's sale, acting with notice of the lien of the judgment creditor, and under the peculiar circumstances of the case.[6]

We have hitherto treated of mortgages of real estate and their incidents. As there may be trusts with respect to personal property, so also there may be mortgages of the same. The mortgagee in such case, is in equity a trustee for the mortgagor. Personal property may also be pledged for the payment of debts. A mortgage and a pledge of chattels are in some respects similar to each other, but there are important points

[1] Crafts v. Aspinwall, 2 Comst. 289.
[2] 6 Paige, 42. 3 Barb. Ch. R. 158.
[3] Id.
[4] Franklin v. Van Cott, 11 Paige, 129
[5] M'Kinstry v. Mervin, 3 J. Ch. R. 466.
[6] Cook v. Mancius, id. 96, 100

with respect to which they differ. A mortgage of chattels is a transfer of personal property upon condition, on the non-performance of which the whole title vests at law in the mortgagee, in the same manner as in mortgages of land. But, in a pledge, a special property only passes to the pledgee, with a right of possession, the general property remaining in the pledgor. The distinction between the two securities is pointed out in several of our cases, and is well established. A mortgage of goods, say the court in an early case, is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has at law an absolute interest in the thing mortgaged, whereas a pawnee has but a special property in the goods to detain them for his security.[1]

Delivery is essential to the validity of a pledge. When no time has been fixed for its redemption, the pawnor may at any time redeem, and the right of redemption does not terminate by his death, but survives to his personal representatives against the pawnee and his representatives. The pawnee does not acquire an absolute title, simply by the failure of the pawnor to pay the debt, or redeem the property at the time specified. His interest is to retain the property for his security. There is no forfeiture till the pawnor's rights are foreclosed.[3]

The pawnee may, by calling upon the pawnor to redeem, and his refusal, vest in himself the absolute property in the pledge. The usual course is, on default of payment, to sell, on reasonable notice to redeem.[4]

An action in equity, by the pawnor, to redeem the property pledged, has frequently been sustained; and it is presumed that an action to foreclose may, under peculiar circumstances, be maintained by the pledgee.[5]

It is settled, also, that a pledge may be taken as a security for future loans. In this respect it stands on the same footing as a mortgage for future advances, which we have already considered, and which is as applicable to chattel mortgages as to mortgages of land.[6]

While delivery is said to be essential to the existence of a pledge, a mortgage of chattels is good and valid between the parties without it.

[1] Brown v. Bement, 8 J. R. 96, 98. Cortelou v. Lansing, 2 Cain. Cas. in Er. 200. Barrow v. Paxton, 5 J. R. 258. Jones v. Smith, 2 Ves. jr. 378. M'Lean v. Walker, 10 J. R. 471.

[2] Cortelou v. Lansing, 2 Caines' Cas. in Error, 200.

[3] Brownell v. Hawkins, 4 Barb. 493.

[4] Cortelou v. Lansing, supra. Hart v. Ten Eyck, 2 J. Ch. R. 100. Tucker v. Wilson, 1 P. Wms. 261. Lockwood v. Ewer, 2 Atk. 303.

[5] Id.

[6] Hendrick v. Robinson, 2 J. Ch. R. 309. Jones v. Smith, 2 Ves. jr. 372. De Maimbray, 2 Vern. 698. United States v. Hoe, 3 Cranch, 73. Shirras v. Caig, 7 id. 34. Brinkerhoff v. Marvin, 6 J. Ch. R. 429. Jarvis v. Rogers, 15 Mass. 389. Otis v. Sill, 8 Barb. 102.

Possession continuing in the mortgagor is not inconsistent with the instrument at common law, and was treated merely as a badge of fraud.[1]

A chattel mortgage transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by performance of the condition.[2] And upon failure to perform the condition, the mortgagee acquires an absolute title to the chattel.[3] And, without a foreclosure, the property may be levied upon by virtue of an execution against the mortgagee.[4]

And the mortgagor, after the expiration of the day for payment, looses all legal right to the property, and cannot maintain an action for it, if it be wrongfully taken. And even when the mortgage contains a clause, authorizing the mortgagee, upon default of payment of the debt, at the time agreed on, to sell the property at auction or private sale, the title still vests in the mortgagee, absolutely, on failing to perform the condition, without any sale being made.[5] And he may take possession without any further act.[6]

A chattel mortgage may contain a stipulation authorizing the mortgagor to retain possession until the time of payment has arrived. And it may, in such case, empower the mortgagee, in case of any attempt of the mortgagor to remove or dispose of the property, to seize the same and sell it, and appropriate enough of the proceeds to pay the debt; and this, whether the debt has become due or not, by the terms of the mortgage.[7]

It is a legitimate inference, from the principles before stated, that after the condition is broken, and the title of the mortgagee has become absolute at law, no subsequent tender by the mortgagor to the mortgagee, of the moneys secured thereby, will operate to reinvest the title in the mortgagor.[8]

The rigor of the common law rule has, in relation to chattel mortgages, as well as mortgages of lands, been mitigated. In relation to both, the mortgage is a security for a debt, and it is the business of courts of equity to relieve against the forfeiture in one case as well as the other, on payment of the debt, interest and costs. This doctrine is now well settled in this state, and probably elsewhere. The mortgagor may bring

[1] Barrow v. Paxton, 5 J. R. 261. Lewis v. Stevenson, 2 Hall's S. C. R. 63.

[2] Butler v. Miller, 1 Comst. 496.

[3] Brown v. Bement, 8 J. R. 96. Ackley v. Finch, 7 Cowen, 290. Divver v. McLaughlin, 2 Wend. 596. Langdon v. Reed, 9 id. 80. Patchin v. Pierce, 12 id. 61. Fuller v. Acker, 1 Hill, 473.

[4] Ferguson v. Lee, 9 Wend. 258.

[5] Burdick v. McVanner, 2 Denio, 171. Case v. Boughton, 11 Wend. 109.

[6] Id. Langdon v. Buel, 9 Wend. 80.

[7] Russell v. Butterfield, 21 id. 300.

[8] Patchin v. Pierce, 12 id. 61.

an action to redeem, and the mortgagee may have a corresponding one to foreclose, though in general a sale of the property, as in case of a pledge upon reasonable notice to the mortgagor to redeem, is equally effective without a resort to judicial proceedings.[1] There has long been a tendency in our courts, to assimilate the equitable rights of mortgagor and mortgagee of chattels to the corresponding rights of the parties to mortgages of real estate. The right of redemption and of foreclosure, in case of mortgages of chattels, has been repeatedly recognized by the most eminent judges and in the highest courts.[2]

A pledge, and a mortgage of personal property, are both good without being evidenced by any written contract.[3] At common law, they were created by delivery of the property, though, with respect to a mortgage, it remained still good between the parties and purchasers with notice, though not followed by a continued change of possession. The possession of the mortgagor was not esteemed inconsistent with the nature of the contract. The provisions of the Revised Statutes, and of the act of 1833, requiring mortgages of personal property to be filed in the office of the town clerk,[4] are for the benefit of creditors, subsequent purchasers and mortgagees in good faith. They have no application to their validity between the parties and those who purchase with notice;[5] nor to the remedy in equity by mortgagor or mortgagee. This branch of the subject was sufficiently considered under the head of fraud.[6]

When a pledge is not capable of *manual* delivery, as shares of stock in an incorporated company, a pledge may be created by a written transfer; and the transaction may be a pledge, instead of a mortgage, although the legal title passes to the creditor.[7]

Whether the transfer of the shares of stock of a corporation be a pledge or a mortgage, depends, in doubtful cases, on the circumstances. The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the things pledged on payment of the debt. Where the plaintiff transferred to the defendants,

[1] Patchin v. Pierce, 12 Wend. 61. Charter v. Stevens, 3 Denio, 33. Hart v. Ten Eyck, 2 J. Ch. R. 100. Lansing v. Goelet, 9 Cowen, 372, per Jones, Ch.

[2] Huntington v. Mather, 2 Barb. S. C. R. 538. Mattison v. Baucus, 1 Comst. 296. March v. Lawrence, 4 Cowen, 467. Otis v. Wood, 3 Wend. 500. Baily v. Burton, 8 Wend. 347–8. Id. 375, and cases under preceding note.

[3] Ferguson v. The Union Furnace Co. 9 Wend. 345. Hall v. Tuttle, 8 id. 375.

[4] 2 R. S. 136, § 5, p. 137, § 1. Laws of 1833, p. 402.

[5] Sanger v. Eastwood, 19 Wend. 514. Gregory v. Thomas, 20 id. 17.

[6] See ante, 241, et seq.

[7] Wilson v. Little, 2 Comst. 443.

on the books of the corporation, fifty shares of the stock in the New-York and Erie Railroad Company, by an instrument absolute in its terms; and at the same time gave to the defendants his note for $2000 borrowed money, and in the note it was stated that the stock was *deposited as collateral security*, it was held that the transaction was a pledge, and not a mortgage of the stock.[1] The pledgee holds the property in trust as a security; if, therefore, he sells it without authority, it is a violation of his trust, although he afterwards purchases other articles of the same kind and value, to be returned to the pledgor; unless there is some agreement, either express or implied, between the parties, that he shall be permitted to do so.[2]

The difference between a *pledge* and a *hypothecation* is, that, in the former, possession in the pledgee is essential, and, in the latter, the transaction is valid, though the possession remains in the original owner. It is defined by Story to be a pledge without possession by the pledgee.[3] And he says, there are few cases, in our law, where an hypothecation, in the strict sense of the Roman law, exists. What is called an hypothecation of shares in incorporated companies, is usually effected by delivery of the certificate of the company for the shares given to the borrower, with a power of attorney to the lender to make the actual transfer on the books of the company. The actual transfer is frequently postponed or omitted, but the transfer, or at least notice to the company, is deemed requisite to the complete efficiency of the security.[4] But the cases already cited show that this security is a pledge, and subject to all the incidents of that security.

SECTION III.

OF ASSIGNMENTS, LEGAL AND EQUITABLE.

BOTH real and personal property, as well as choses in action, may be and often are, assigned in special trust. The most usual object of such assignments is the distribution of the property of the assignor among

[1] Wilson v. Little, 2 Comst. 443. Reeves v. Capper, 5 Bing. N. C. 142. Allen v. Dykers, 3 Hill, 593. 7 id. 498; and see Huntington v. Mather, 2 Barb. S. C. R. 538, contra.

[2] Dykers v. Allen, 7 Hill, 498.

[3] Story on Bailment, § 288.

[4] 2 Kent's Com. 577, note.

his creditors, towards the payment and satisfaction of their debts. This species of trust is still upheld, by the Revised Statutes, even with respect to the real estate of the assignor; and it remains, as at common law, with respect to personal property.[1] Under what circumstances assignments may be fraudulent as against creditors, and in what manner courts of equity relieve against them for that cause, have been considered under the head of fraud.[2] We propose now to consider the subject under a different aspect, in reference more particularly to what may be assigned, and to the execution of the trusts upon which they are made.

At common law, the assignment of a chose in action could not be made so as to vest in the assignee a right of action in his own name.[3] But in England, the king, by his prerogative, was an exception to this rule, and his assignee might sue in his own name; and in this country the same prerogative is enjoyed by the government, as succeeding to all the rights of the British crown.[4] But courts of equity always protected the rights of assignees, and courts of law, in modern times, also take notice of, and protect such rights against all persons having either express or implied notice of the assignment.[5] A knowledge of such facts and circumstances as are sufficient to put the party on inquiry is equivalent to actual notice; and he who disregards them, acts contrary to good faith, and at his peril.[6] The general rule before the code was, that all choses in action might be assigned in equity, and the assignee had an equitable right which he might in a court of law enforce in the name of the assignor.[7] But now, by the code, the rule in this state is the same in all courts, and every action arising on contract is required to be prosecuted in the name of the real party in interest, except actions by executors, administrators, and trustees of an express trust, who are authorized by statute to sue, without joining with them the persons for whose benefit the action is prosecuted.[8] But the principles which regulate assignments are the same as before. The code operates merely on the form of the remedy.

As a general rule, therefore, all choses in action, such as bonds, mortgages, notes, judgments, debts, contracts, agreements, as well relating to personal as real estate, are assignable, and will pass to the assignee

[1] 1 R. S. 728, § 55, subd. 1. Kane v. Gott, 24 Wend. 661, per Cowen, J.

[2] Ante, p. 241.

[3] Bacon's Abr. tit. Assignment A, and notes.

[4] U. States v. Buford, 3 Peters, 30.

[5] Johnson v. Bloodgood, 1 J. C. 51. Wardell v. Eden, 2 id. 121. Van Vechten v. Graves, 4 J. R. 403. Littlefield v. Storey, 3 id. 425. Anderson v. Van Allen, 12 id. 343. Briggs v. Dorr, 19 id. 95. Wilkins v. Batterman, 4 Barb. 47.

[6] Id.

[7] Wheeler v. Wheeler, 9 Cowen, 34 and preceding cases.

[8] Code, §§ 111, 113.

a right of action, in the name of the assignee, by force of the code, against all parties liable to any action.[1] But there are some exceptions to the above rule, even in equity. The beneficial interest of a *cestui que trust* in rents and profits is, in certain cases, inalienable by statute.[2] And pensions granted by the general government for revolutionary services are forbidden to be sold, assigned or mortgaged.[3] In one case it was said by a learned judge, that a simple expectancy in which the assignor has no interest, and which is unpurchasable, can neither be assigned, nor would a contract for future assignment be valid. A mere *jus precarium*, a right resting in curtesy, is no more a matter of bargain than the virtue from which it emanates.[4] But the extra allowance promised by the legislature to canal contractors, by the act of 1836,[5] on the completion of their jobs, in consequence of the rise in prices and the value of forage subsequent to entering into their contracts, was held by the court of errors, by the equity of the statute, to belong to the assignee of the contract by whom the work was done.[6] The allowance was not esteemed a mere gratuity, but a just and equitable remuneration, made necessary by circumstances not within the contemplation of either of the parties when the contract was made. But a bare possibility of an uncertain interest is not assignable.[7]

Under the provisions of the Revised Statutes, a mere possibility coupled with an interest is capable of being conveyed or assigned at law, as well as in equity, in the same manner as an estate or interest in possession.[8] And, independently of the Revised Statutes, any interest whatever in personal property, or a mere possibility coupled with an interest in real estate, was assignable in equity.[9]

A life estate charged with the support of infants is alienable, subject to the charge.[10] A claim against a foreign government for an illegal capture is assignable in equity.[11] An assignment of the services of an indented apprentice, though not binding on him, is good between the parties.[12]

[1] Bac. Abr. tit. Assignment.

[2] 1 R. S. 730, § 63. Hone v. Van Schaick, 7 Paige, 221, 234. Aff. 20 Wend. 564.

[3] Laws of U. S. vol. 6, 274, § 4, act of 1818.

[4] Munsell v. Lewis, 4 Hill, 642, per Cowen, J.

[5] Laws of 1836, p. 201.

[6] Munsell v. Lewis, 2 Denio, 224, overruling S. C. in 4 Hill, 642.

[7] Touchstone, 239. Mitchell v. Winslow, 2 Story's R. 630.

[8] 1 R. S. 725, § 35. Lawrence v. Bayard, 7 Paige, 76.

[9] Id. Whitfield v. Faucet, 1 Ves. sen. 391. Wright v. Wright, id. 411.

[10] Emmons v. Cairn, 3 Barb. S. C. R. 243.

[11] Couch v. Delaplain, 2 Comst. 397 Milnor v. Metz, 16 Peters, 221.

[12] Guilderland v. Knox, 5 Cowen, 365.

The provisions of the code as to bringing the action in the name of the party in interest, when he is the assignee of a chose in action, extends only to the assignment of things in action arising out of *contract*.[1] If the cause of action originate in *tort*, the former rule prevails; and though equity will recognize and protect the rights of the assignee, yet the action must be brought in the name of the assignor. And hence a right of action for the conversion of personal property,[2] or for a personal tort,[3] is not assignable, so as to give the assignee a right of action in his own name. But though, in these cases, the assignee cannot sue in his own name by virtue of the assignment, yet, if the party make an express promise to pay the assignee, it seems the latter can maintain an action upon that promise.[4]

With regard to the instrument by which an assignment may be made, it has been held that delivery, for a valuable consideration, of a chose in action, without writing, is a sufficient transfer.[5] And thus a judgment of a court of record, a bond or covenant, and a mortgage of real estate, may all be assigned orally, by mere delivery, without any instrument in writing declaring the transfer.[6] The assignment of a debt necessarily carries with it, as an incident, a collateral mortgage,[7] by which it is secured. So an assignment of a judgment necessarily carries with it the debt, and any mortgage given to secure it; and if the assignment be of a part of the debt, or judgment, it carries along with it a similar part of the mortgage.[8] An assignment of shares of stock in an incorporated company passes the growing profits of such shares.[9]

As a specialty may thus be assigned by parol, it is scarcely necessary to add that a written assignment, without seal, is equally effective to pass the interest as an assignment under seal.[10] The foregoing rules apply also to the assignment of chattel mortgages.[11]

There are cases in which something short of an actual transfer and delivery of a chose in action, will operate as an equitable assignment of the whole, or of some part of it. No particular form of words is neces-

[1] Code, § 111.

[2] Gardner v. Adams, 12 Wend. 297.

[3] The People v. Tioga Com. Pleas, 19 Wend. 73.

[4] Compton v. Jones, 4 Cowen, 73. De Forest v. Frary, 6 id, 151. Dubois v. Doubleday, 9 Wend. 317. Jessel v. Will. Ins. Co. 3 Hill, 88.

[5] Green v. Hart, 1 J. R. 580. Canfield v. Munger, 12 id. 346. Prescot v. Hull, 17 id. 284.

[6] Ford v. Stuart, 19 J. R. 342. Briggs v. Dorr, id. 95. Dawson v. Cole, 16 id. 51. Runyon v. Mersereau, 11 id. 534.

[7] Jackson v. Blodgett, 5 Cowen, 202.

[8] Pattison v. Hull, 9 id. 747.

[9] Kane v. Bloodgood, 7 J. Ch. R. 108.

[10] Ford v. Stuart, 19 J. R. 95. Dawson v. Coles, 16 id. 51.

[11] Langdon v. Buel, 6 Wend. 80.

sary for this purpose. Any language which indicates a clear intention to appropriate the fund, will effectuate the object.[1] Thus it has been held, that an order to pay a debt out of a particular fund belonging to the debtor is an equitable assignment of the fund *pro tanto*, and gives the creditor who receives the order a specific equitable lien upon such fund.[2] This was in conformity to the doctrine of Lord Thurlow, who held the same way in a case in which the order had not been accepted. His lordship thought that the giving the order, though by a man in failing circumstances and for a forgone consideration, worked a transfer of the fund *pro tanto*.[3] In like manner, the order of a landlord on his tenant, directing him to pay to the person therein named, the accruing rents on certain leases, and which order is founded on a good consideration, is an equitable assignment of the rent, and the tenant is bound, on receiving notice of it, to pay the rent accordingly, whether he accepted the order or not.[4] So a covenant to pay over one half of any recovery that shall be had against an insurance company, in an action for a loss of a cargo by illegal capture, carries one half of the demand, and extends to a compensation for the capture awarded under a treaty.[5]

There is a distinction between an order drawn on a general or particular fund for the *whole* of it, and an order drawn only for a *part*. In the former case it amounts to an equitable assignment of the fund, after notice to the drawee, and in the latter it does not, unless the drawee consent to the appropriation by the acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract.[6] The reason is, that a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract.[7]

This question did not arise in Pattison v. Hull, (*supra*,) because the bill was taken as confessed against the mortgagors, and they must be presumed to have acquiesced in the appropriation of the fund by the mortgagee; and, moreover, as all the persons interested in the fund were par-

[1] Dickerson v. Philips, 1 Barb. S. C. R. 458.

[2] Bradley v. Root, 5 Paige, 632.

[3] Yeates v. Groves, 1 Ves. jr. 280.

[4] Morton v. Naylor, 1 Hill, 583. Ex parte Alderson, 1 Mad. R. 39. Lett v. Morris, 4 Sim. 607. Clark v. Mauran, 3 Paige, 373.

[5] Wood v. Young, 5 Wend. 620.

[6] Mandeville v. Welch, 5 Wheat. 286 Tiernan v. Jackson, 5 Peters, 580. Cowperthwaite v. Sheffield, 1 Sand. S. C. R. 450.

[7] Id.

ties to the bill, it was immaterial to the mortgagors whether the money was paid to the mortgagees or to their assigns. Nor did it arise in Bradley v. Root, (supra,) because the assignment was of the *whole* contract then remaining unexecuted, which consequently carried with it a specific lien upon the moneys thereafter to be received for the performance of the contract. Nor did it arise in Yeates v. Groves, (supra,) before Lord Thurlow, for in that case the debtor assented to an assignment of a part of the demand. And in Morton v. Naylor, (supra,) there was a parol *acceptance* by the tenant of the order, which amounted to his assent to a partial appropriation of the rent. The distinction may, indeed, be said to be recognized by the New-York cases, and it certainly is not repudiated by them.[1]

In order to constitute an equitable assignment, by a debtor to his creditor, of a sum due to the debtor from a third person, there must not only be an *agreement* to pay the creditor out of the particular fund, but an *appropriation* of the fund, either by giving an order upon it, or by transferring it in such a manner that the holder is authorized to pay it to the creditor directly, without the further intervention of the debtor.[2]

Upon this principle the court of errors held that a *covenant* to pay certain debts out of a designated fund, when the same should be received by the debtor, did not give the creditor a *specific* lien on the fund; but was a mere *personal* covenant.[3] The ground of the decision was that there was no assignment, no mortgage or pledge, no order or other specific appropriation of the funds, but a mere covenant to pay them over on their being obtained by the covenantor.[4] This created merely a personal obligation and not a specific lien or appropriation. And though the correctness of the doctrine was questioned by the chancellor in subsequent cases,[5] yet it has not been overruled, but in truth approved in a later case, and is believed to be in strict conformity to the current of authorities.[6]

If there be no provision in an assignment for the benefit of creditors, that the latter can take no benefit under it, unless they signify their assent by executing it as parties, it will be sufficient if they have notice of the trust in their favor, and assent to it. And if no affirmative act be exacted from them, their assent will be presumed.[7] Where an express

[1] Cowperthwaite v. Sheffield, 1 Sand. S. C. R. 450, 451. Peyton v. Hallett, 1 Caines' R. 363. M'Menomy v. Ferrers, 3 J. R. 72.

[2] Hoyt v. Story, 3 Barb. S. C. R. 262. Burn v. Carvilho, 4 Myl. & Craig, 690. Malcolm v. Scott, 3 Hare, 39.

[3] Rogers v. Hosack, 18 Wend. 319; reversing S. C., 6 Paige, 415.

[4] Per Cowen, in 18 Wend. 334. Williams v. Everett, 14 East, 582, 595, 596.

[5] Hawley v. Ross, 7 Paige, 103. Richardson v. Rust, 9 id. 243.

[6] Hoyt v. Story, 3 Barb. S. C. R. 265.

[7] Garrard v. Lauderdale, 3 Sim. 1. Egbert v. Wood, 3 Paige, 517. New England Bank v. Lewis, 8 Pick. 113. Nicoll v. Mumford, 4 J. Ch. R. 522.

trust is created for the benefit of creditors, without any authority from the trustee to give a preference to any, it is, both at law and in equity, a trust for each of the creditors ratably. And even in the case of an implied trust, where one of the creditors comes into a court of equity to enforce the performance of the trust, except in those cases where he has acquired a specific lien by his superior vigilance, or where he is entitled to a legal preference, the court will act upon its favorite maxim that equality is equity.[1] Where the assignment is to a trustee for the benefit of creditors, the assent of the latter is not in general necessary to the validity of the assignment. The legal estate vests in the trustee, and equity will compel the execution of the trust for the benefit of the creditors, though they be not at the time assenting, and parties to the conveyance.[2]

If an assignment be made to a trustee by a debtor, for the benefit of creditors, the title to the assigned property does not vest in the trustee until his acceptance of the trust. If therefore an execution be delivered against the debtor, subsequent to the execution of the assignment, but before its acceptance by the trustee, the execution acquires the preference.[3] Delivery of a deed is essential to its validity, and this implies an acceptance by the grantee.[4] And when the grantee derives no benefit from the deed, but is subjected to a duty, or the performance of a trust, there can be no presumption of his acceptance, as there may be, when its provisions are beneficial to him.[5]

A deed may be delivered to a stranger for the grantee named therein, without any special authority from the grantee to receive it for him. And if the grantee assents to it afterwards, the deed is valid from the time of the original delivery. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* (Broom's Max. 676.) It is upon this principle that it has frequently been held, that a delivery of a deed to the proper recording officer to be recorded, if intended to vest the title immediately or absolutely in the grantee, either as a trustee or otherwise, is a valid delivery; if not afterwards dissented from by the grantee.[6]

An assignment for the benefit of preferred creditors is valid, though their assent is not given at the time of its execution, if they subsequently assent in terms, or by actually receive a benefit under it. And it makes no difference whether the assignment be to a trustee for

[1] Egbert v. Wood, 3 Paige, 520.
[2] Nicoll v. Mumford, 4 J. Ch. R. 529.
[3] Crosby v. Hillyer, 24 Wend. 280. Jackson v. Phipps, 12 J. R. 418.
[4] Id.
[5] Jackson v. Bodle, 20 J. R. 184.
[6] The Lady Superior v. M'Namara, 3 Barb. Ch. R. 378. Tompkins v. Wheeler, 16 Peters' R. 106, 119. Ingram v. Porter, 4 M'Cord's R. 198.

the benefit of the creditors, or be made directly to the latter. Their acceptance of the grant will in general be presumed from the beneficial nature of it.[1] The assignment will be deemed to take effect from the moment of its execution; and if there be more than one trustee, the property will vest in such as assent to the assignment, and the object of the assignment will not be defeated because a portion of the trustees refuse their assent.

That a debtor in failing circumstances may, by an assignment of his property in trust, give preference to one class of creditors over another, is not doubted at this day. If he honestly devotes all his property to the payment of his debts, no creditor has a right to complain.[2] The trusts contained in this class of assignments are the proper objects of equity jurisdiction. If, indeed, they are impeached as fraudulent, a court of law can, in an action between a purchaser at a sheriff's sale on an execution against the fraudulent assignor, and the trustee or other party claiming under the assignment, often test the fairness and validity of the instrument. But though courts of law, where the questions can be properly presented, have a concurrent jurisdiction with courts of equity in all matters of fraud, yet the nature of the questions arising on the trusts, in such assignments, often places the remedy beyond the reach of those courts. The relief sought is not necessarily to set aside the assignment as fraudulent and void, though it is often invoked for that purpose. The aid of a court of equity is sometimes needed to distribute the fund among the various creditors provided for under the assignment; to determine questions of priority and lien; to adjust conflicting equities and claims of different creditors; to marshal the various funds which are confided to the trustee, so that a creditor having a particular fund as security for payment, may be compelled to resort to it, before taking the property on which alone the other creditors can rely, to protect the rights of sureties, and direct the proper application of collateral securities possessed by any of the creditors. The assignee or trustee takes the assigned property subject to all the equities of the original debtor.[3] If it be a judgment, he takes it subject to the equities of the judgment debtor.[4] And thus, an assignment by one, of a debt previously assigned by him, cannot pass any title, though the debtor may

[1] Brooks v. Marbury, 11 Wheat. 78; S. C., 7 id. 556. Tompkins v. Wheeler, 16 Pet. 119.

[2] Hendricks v. Robinson, 2 J. Ch. R. 283; S. C., 17 J. R. 538. Brooks v. Marbury, 11 Wheat. 78. Nicoll v. Mumford, 4 J. Ch. R. 552. Winteringham v. Lafoy, 7 Cowen, 735. Murray v. Riggs, 15 J. R. 571. Goodrich v. Downs, 6 Hill, 438.

[3] Murray v. Lylburn, 2 J. Ch. R. 441.

[4] Douglass v. White, 3 Barb. Ch. R 621.

lawfully pay to the second assignee, in default of notice from the first.[1] These considerations give rise also to numerous conflicting equities which cannot be readily or conviently adjusted in a court of law.

Although the subject of fraudulent assignments and of the marshaling of securities has already been considered, under other heads, it may not be out of place to notice, in the present connection, the manner in which the subject is dealt with, in cases of fraud, as between the trustee and the creditors of the assignor. If the trust be one which a court of law cannot sanction, the trustee cannot sustain an action against a judgment and execution creditor of the assignor, or one claiming under such execution sale. And neither a court of law, or a court of equity, can sustain an assignment, which shows on its face that it was made, either in whole or in part, in trust for the use of the assignor. Such assignment is void by the statute and at common law, as well as an assignment made with an express intent to defraud creditors.[2] If the fraud appear on the face of the assignment, the question as to its validity can as readily be raised and decided in a court of law, as in a court of equity. Thus, when a debtor in failing circumstances assigned nearly all his property to his son, in trust to sell the same, and apply the proceeds towards paying four of his creditors, making no provision for the rest, and directing that the surplus, if any, after paying the four creditors, should be returned to his assignor, his heirs and assigns, the assignment was held to be void on its face, for the reason that the surplus was made a trust for the use of the assignor; and the property having been taken by the defendant as a deputy sheriff, by virtue of an execution against the assignor, and in favor of a judgment creditor of the latter, not provided for in the assignment, it was held further, that the assignee could not maintain an action at law against the deputy, in consequence of the invalidity of the trust, and that he was rightfully nonsuited for that reason.[3] As was well said, on that occasion, the courts have found great difficulty in upholding assignments which give a preference among creditors, and such transfers have only been allowed to stand when the debtor makes an unconditional surrender of his effects for the benefit of those to whom they rightfully belong.[4] To say that an insolvent debtor can put any portion of his property, not exempt by law, beyond the reach of creditors, is a monstrous proposition. In the language of the chief justice, in Mackie v. Cairns

[1] Muir v. Schenck, 3 Hill, 228. Hopkins v. Banks, 7 Cowen, 650.

[2] 2 R. S. 135, § 1. Id. 137, § 1. Goodrich v. Downs, 6 Hill, 438.

[3] Goodrich v. Downs, 6 Hill, 438.

[4] Hyslop v. Clark, 14 J. R. 458. Seaving v. Brinkerhoff, 5 J. Ch. R. 329. Austin v. Bell, 20 J. R. 442. Mackie v. Cairns, 5 Cowen, 547. Grover v. Wakeman, 11 Wend. 187.

(supra,) "it offends the moral sense; it shocks the conscience and produces an exclamation. It is directly against the statute and cannot stand before it."

In the case of Goodrich v. Downs, the question arose in a court of law, in a case where the fraud was *apparent* in the *trust* deed. The right of a court of law to deal with the question would have been the same, had the fraudulent purpose of the assignment not appeared on the face of the instrument, but been shown by averments supported by extrinsic facts. Thus the continuance of the possession of the assignor, or mortgagor, after the execution of the instrument, and various acts of ownership subsequently asserted by the assignor, afford evidence to a jury, from which fraud may be inferred, as well in a court of law as in a court of equity.[1] However clear and conclusive the evidence of fraud may be, in cases of this description, it must, it seems, in a court of law, be left as a question of fact to the jury; but if the jury comes to a wrong conclusion, a new trial must be granted as in other cases.[2]

But though the same relief can, in many cases, of fraudulent assignments and trusts, be had in a court of law as in a court of equity, yet in all cases courts of equity have concurrent jurisdiction, and in numerous instances can afford more ample and complete relief than can be afforded by an action at law. Thus, where the assigned property consists, in whole or in part, of debts due or to grow due to the assignor, or of choses in action not liable to an execution at law; where it consists of goods, wares and merchandise, which the trustee at once sells from time to time, and converts into money, and an account becomes necessary, or an injunction to restrain a misapplication of the funds, it is obvious that an action in equity is the most appropriate remedy. The legislative provision in favor of judgment creditors who have exhausted their remedies at law, to discover and reach the property of the judgment debtor, whether concealed by him, or held in trust for him, was dictated by the necessity of a more perfect remedy than can be afforded by an ordinary action at law.[3]

The cases in which equity can afford the best relief are illustrated by an important case in which it was granted by the chancellor, and his decree was affirmed by the court of errors.[4] In that case the bill was filed

[1] Gardner v. Adams, 12 Wend. 297. Jackson v. Timmerman, 12 id. 299. Hamilton v. Russell, 1 Cranch, 310. Twyne's case, 3 Coke, 80. Bissell v. Hopkins, 3 Cowen, 166.

[2] 2 R. S. 137, § 4. Vance v. Philips, 6 Hill, 433.

[3] 2 R. S. 173, § 38.

[4] Stodard v. Butler, 20 Wend. 507

by judgment creditors of the assignors, whose execution at law had been returned wholly unsatisfied, to set aside an assignment which had been made by the judgment debtor, pending the action at law, to two of their creditors, *for and towards* the payment and satisfaction of a debt of about $675 due to them. The goods assigned consisted of many parcels of small value separately, and of notes and accounts, against numerous persons, and principally for small amounts. The aggregate value of the property assigned was equal to twice the amount of the debt of the assignee. The goods, notes and accounts were left in the possession of the assignor, who was authorized by the assignees, as their agent, to sell and dispose of the goods for cash or good security, and to collect the amounts, and was to be paid a fair compensation for his services. The assignor had no visible means of supporting himself and family other than his business as a merchant, and after the assignment continued in his store, trading as usual, until the goods were removed to another place, and no difference was observed in the management of the store after the assignment from what had been usual previous to that event. The chancellor decreed the assignment to be fraudulent and void as against the creditors of the assignor, and set it aside; 1st, because there was no change of possession of the assigned property; 2d, because the amount of it greatly exceeded the amount of the debt; 3d, because the form of the assignment indicated that the assignees were to hold the property absolutely, though it exceeded the amount of their debt, and if it fell short, had their remedy unimpaired against the assignor for any deficiency, thus leaving it fairly to be presumed that some secret or implied understanding existed between the parties to the transaction, to keep the surplus from other creditors for the benefit of the assignor himself. The decree of the chancellor was affirmed by an equal division of the court of errors. As those who differed from the chancellor did so, to a great extent, on questions of fact, it is unnecessary in this place to canvass their reasons in other respects. Those questions of fact would, in a court of law, have had to be submitted to a jury; but in a court of equity, where no issue for a jury trial had been asked by either party, were necessarily decided by the court. Though in this case, had the plaintiff's execution, instead of being returned unsatisfied, been levied on the goods in the store and in the possession of the assignor, the validity of the assignment could have been tested in an action at law against the sheriff at the suit of the assignees, yet the relief afforded would only have extended to the property seized; and have left a resort to equity still necessary to obtain an account of the sales, and the proceeds of the notes and accounts. It was, therefore, a proper case for the interposi-

tion of a court of equity, which could administer the remedy in a more effective and comprehensive manner than a court of law.

Numerous other cases may be cited, showing in what manner a court of equity aids a creditor in setting aside a fraudulent assignment, and in discharging property from the incumbrances of a trust. It is a part of its legitimate office to remove obstructions to the free operation of the ordinary course of justice, and to disperse the clouds which the cunning devices of the fraudulent may gather around the title to property.[1]

But the assistance of equity is by no means confined to creditors seeking to set aside an assignment as fraudulent. It is often indispensable that its aid should be granted to creditors claiming under the assignment, to compel the execution of the trust, to supply the failure of a trustee, or to restrain a threatened breach of trust prejudicial to those interested in the trust funds.

We may conceive of cases in which the refusal of a trustee to act would subject him to an action at law; but that is not the usual nor the appropriate remedy. In general, it may be said, that if a trustee becomes disqualified to act, as if a *femme* trustee marry;[2] or if the trustee misbehave himself in any way, as if he improperly become a purchaser of the trust fund;[3] or if he abscond on a charge of forgery;[4] or if he refuse to execute the trust, when reasonably required to do so by the cestui que trust;[5] in these and the like cases, the cestui que trust may have the old trustee removed, and a new trustee appointed in his room. This power of the court existed before the Revised Statutes, which are in a great measure declaratory, in this respect, of the then existing law.[7] In a recent case, when a trustee in a mortgage, given by a railroad company, to secure the payment of certain of its bonds, as they should become due and payable, suffered a portion thereof to remain unpaid after maturity, and neglected and refused to take possession of the mortgaged property, and to execute the trust by enforcing the mortgage, on the request of the bond holders, without any sufficient excuse for such neglect and refusal, it was held to be a proper case for the removal of the trustee.[7] As the court will not permit a trust to fail for the want of a trustee to

[1] Petit v. Shepherd, 5 Paige, 493. Radcliff v. Rowley, 2 Barb. Ch. R. 23.

[2] Lake v. De Lambert, 4 Ves. 592.

[3] Ex parte Reynolds, 5 Ves. 707. Millard v. Eyre, 2 Ves. jr. 94.

[5] In the matter of the Mechanics' Bank, 2 Barb. S. C. R. 446.

[6] De Peyster v. Clendining, 8 Paige, 295.

[7] 2 Barb. S. C. R. 446.

execute it, so when all the trustees refuse to act the trust devolves upon the court, and a new trustee will be appointed if necessary.[1]

Although the removal of the trustee and the appointment of another, for the refusal of the former to perform his duty when required, affords in general an ample remedy, yet it is conceived that a trustee may be required by the order or decree of a court of equity to execute a duty required by the nature of the trust. Though at law the legal interest in the estate, whether real or personal, is in the trustees, and they are entitled to exercise all the powers of disposition incident to the legal ownership, yet in equity their legal powers are regarded as under the control, and to be exercised in subserviency to the interest of the *cestui que trust*, according to whose direction it is their duty to convey and dispose of the trust property. In general, a valid trust in its creation vests the whole estate in the trustees in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust is created takes no estate or interest in the lands, but may enforce the performance of the trust in equity.[2] And when the trust is of personal estate, and so not within the statute, the trustee is bound to convey the property according to the direction of the *cestui que trust;* and if he fails to do so, he will be chargeable with costs, in an action to compel such conveyance.[3]

When the trustee sets up unfounded objections to the performance of his trust, and renders an application to the court necessary, he will be subjected to the costs of the litigation.[4]

As with us, the estate of the trustee ceases when the purposes for which an express trust was created has ceased; and as a trust does not, on the death of a surviving trustee, descend to his heirs, but, if then unexecuted, vests in the court of chancery with all the powers and duties of the original trustee, it is obvious that the occasions for requiring a conveyance, from the original trustee to a new trustee, are less frequent here than in England; but whenever such conveyance is necessary, it may be decreed.

There are cases where it is not necessary, in order to obtain relief, either to apply for the removal of a trustee for misbehavior, or for the appointment of another. If the trustee has parted with the trust fund fraudulently, the *cestui que trust* may, at his election, either proceed against the trustee alone for satisfaction, or may join the fraudulent

[1] 1 R. S. 730, § 70.
[2] 1 R. S. 729, § 60.
[3] Penfold v. Bouch, 4 Hare, 271.
[4] Willis v. Hiscox, 4 Myl. & Cr. 197.

assignee in the same action.[1] In such a case, the fraudulent assignee of the trustee is treated as the trustee for the purpose of the remedy.

As the *cestui que trust* may compel the trustee to perform his duty, or remove him for his misconduct, so, on the other hand, the trustee may be restrained by an injunction from doing an act not warranted by the instrument creating the trust. The principle on which the court acts is, that a trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the legitimate purposes of the trust.[2]

No assignment for the benefit of creditors will be upheld which is made in contravention of the statute, or public policy. Hence, an assignment authorizing the assignee to *lease* or *mortgage* the assigned property for the benefit of creditors is invalid, the statute only authorizing such an assignment *to sell lands* for the benefit of creditors.[3] Nor can an assignment be upheld which authorizes the assignee to name the successor of the trustee, in case the trastee named in the assignment wishes to resign. For such an authority might deprive the court of the power to remove the trustee and appoint another in his place, upon the application of the creditors.[4] Nor can it be upheld if it attempts to release the trustee from the degree of care, in the management of the the trust, which the law devolves upon him.[5]

SECTION IV.

OF MARRIAGE SETTLEMENTS, AND EXECUTORY CONTRACTS FOR SUCH SETLLEMENTS.

HAVING thus noticed some of the trusts created by deed, as they occur in mortgages and assignments, we shall proceed, under the same general head, of trusts created by deed, to the doctrine of trusts in reference to marriage settlements, and executory contracts for such settlements. It

[1] Bailey v. Inglee, 2 Paige, 278. Anderson v. Van Allen, 12 J. R. 343. Shepherd v. M'Evers, 4 J. Ch. R. 136. Gilchrist v Stevenson, 9 Barb. 9.

[2] Ballis v. Strutt, 1 Hare, 146. Anonymous, 6 Mad. Ch. R. 10. Webb v. Earl of Shaftesbury, 7 Ves. 487. Robertson v. Bullions, 9 Barb. 64

[3] 1 R. S. 728, § 55. Plank v. Schermerhorn, 3 Barb. Ch. R. 646.

[4] Id.

[5] Litchfield v. White, 3 Seld. 438. For other matters on the subject of fraudulent assignments, see the head Fraud, CHAP. III.

is not proposed to discuss, under this head, the relative rights of husband and wife, nor to treat of the wife's equity to a separate provision out of her own property, which the husband cannot reach without the aid of a court of equity. The first belongs to a treatise on the doctrines of the common law; and the last will be more conveniently considered, when treating of the rights of married women, under a subsequent head.[1] At present, we propose only to notice the subject of marriage settlements, as it affords illustrations of the doctrine of trusts.

The effect which marriage has, at common law, upon the capacity of the wife to make contracts, and upon her property generally, lead to the introduction of marriage settlements. Their object, especially in the case of a *strict settlement*, is to provide a life estate for the wife, beyond the control of the husband, and to secure a provision for the issue of the marriage, which the parents cannot defeat. A few remarks on the doctrines of the common law, will show the reasonableness and adaptation of such settlements to the purposes for which they are designed.

It is a general rule of the common law that a married woman cannot possess personal property, and that every thing of this nature, to which she is entitled at the time of her marriage, and which accrues in her right during its continuance, is vested solely in her husband.[2]

The personal property to which a woman may be entitled at the time of the marriage, or during its continuance, consists of three kinds, viz. *chattels personal*, *choses in action*, and *chattels real*. Marriage operates as an absolute gift to the husband of all the property coming under the description of *personal chattels*, which were in the possession of the wife at the time of the marriage, or which come to her during coverture, whether by gift or bequest, or in any other way. The husband is also entitled to all the wife's earnings by her skill or labor, and these belong to him absolutely, and they do not survive to her, but go to his executors or administrators.[3] To the *choses in action* which belonged to the wife at the marriage, or which accrue to her during coverture, the husband is entitled, if he reduces them to possession during his lifetime; but if he dies without doing so, they become hers by survivorship. But if she dies before he has reduced them to possession, he takes them only as her administrator, and not by survivorship. The *chattels real* of the wife, such as terms for years, whether legal or equitable interests, be-

[1] Post, CHAP. VIII, Sec. 2.

[2] Clanc. Rights of Women, 1. Reeves' Dom. Rel. 1. Blanchard v. Blood, 2 Barb. S. C. R. 355. Co. Litt. 351, b. Butler's Notes, 304, to lib. 3, Co. Litt. 2 Kent's Com. 143.

[3] Id. Lovitt v. Robinson, 7 How. Pr R. 105.

long to the husband in a qualified manner. He may transfer them in his lifetime, and thus become entitled absolutely to the avails of them. But he cannot dispose of them by will, and if he fails to dispose of them while he lives, they survive on his death to his wife. He has the same right to her chattels real which accrue to her during the coverture;[1] and he is entitled to the rents and profits of her real estate during the coverture. As a compensation for these benefits, the law throws upon the husband the burden of the wife's debts, which were incurred while she was sole, and makes him liable for them at any time during the continuance of the marriage.[2]

The foregoing are principles of the common law. How far they are modified by the act for the more effectual protection of the property of married women,[3] will be considered when we come to treat of the subject of married women hereafter.

It is obvious, that in the present state of society, there is sometimes an appearance of hardship in the operation of the strict rules of the common law. The hopes of a parent, which have been centered on the rising fortunes of a daughter and her offspring, may be blasted alike by the unexpected profligacy of her husband, and the unforeseen vicissitudes of business. The accumulations of a life of industry and economy may be thus swept away, and she, who was brought up in affluence, may be doomed, without fault on her part, to a life of penury and want. Parental affection, as well as humanity, will struggle to prevent such a disastrous result.

But while the common law will not allow a married woman to possess personal property, independent of her husband, a court of equity will uphold a *trust* created for the sole benefit of the wife, and see that it is strictly performed. Property of any description, real or personal, may be limited to the use of a married woman. Such estate may be created either before, or during the marriage. Before marriage it may be created by the woman herself of her own property, or by the intended husband, or a stranger. During the marriage it may be created by the husband,[4] or by a stranger, but not by the wife; and if a marriage takes place without a settlement, or an agreement for one, a court of equity cannot relieve against the doctrines of the common law.[5]

The trusts contained in marriage articles, are of two kinds; trusts *executed*, and trusts *executory*. Trusts executed are legal estates, and are to be construed by the rules applicable to such estates; trusts *executory*

[1] Clancy, 2, 10. Co. Litt. 351, a.
[2] Bac. Abr. tit. Baron and Feme, C.
[3] L. of 1848, p. 307. Id. 1849, p. 528.
[4] Coomes v. Elling, 3 Atk. 679. Clancy 251.
[5] Incledon v. Northcote, 3 Atk. 435.

are when something is expressly or impliedly required to be done; and with this latter class of trusts, courts of equity take more liberty, and carry them out according to the intent of the parties.[1] And there is no difference in the execution of an executory trust, created by a will, and of a covenant in marriage articles.[2] While the rule, as laid down in Shelley's case,[3] was in force, the difficulty was to settle when the *rule*, and when the *intention*, in opposition to the rule, should prevail. If the rule prevailed, the word *heirs* was treated as a word of limitation, the whole power of disposition vested in the first taker, and he became owner in fee. If however, the word *heirs* could be treated as a word of purchase, the first taker would be seised only of an estate for life.[4] The rule in Shelley's case was the law of this state prior to the Revised Statutes.[5] By those statutes it is enacted, that "where a remainder shall be limited to the heirs, or heirs of the body of a person to whom a life estate, in the same premises, shall be given, the persons who, on the termination of the life estates, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them."[6] The abolition of the rule applies equally to deeds and wills.[7] The effect of the rule, as declared by the act, will be, in those cases where the rule in Shelley's case would otherwise have applied, to change estates in fee into contingent remainders, and to tie up property from alienation during the life of the first taker and the minority of his heirs.[8] This is precisely the object sought to be obtained by a *strict settlement*. For this purpose, it is not enough to provide a life estate for the wife. One of the principal objects of a strict settlement is to secure a provision for the issue of the marriage, which it shall not be in the power of either parent to defeat. This object was accomplished, formerly, by so framing the articles that the trust could be treated as executory, and thus the intention of the party could govern, and the first taker be deprived of the power of destroying the contingent remainders.[9] The change introduced by the Revised Statutes has greatly facilitated the accomplishment of this object.

[1] Bagshaw v. Spencer, 2 Atk. 577, 580. Roberts v. Dixwell, 1 id. 607. 1 Fonb. Eq. B. 1, ch. 6, § 8, note s. Wood v. Burnham, 6 Paige, 513; affirmed on appeal, 26 Wend. 9.

[2] The Countess of Lincoln v. The Duke of Newcastle, 12 Ves. 227, per Ld. Eldon.

[3] 1 Co. 104.

[4] See a review of the cases on the rule in Shelley's case, 4 Kent's Com. 214–233.

[5] Schoonmaker v. Sheely, 3 Hill, 165; S. C. in error, 3 Denio, 485. Brant v. Gelston, 2 J. Cas. 384.

[6] 1 R. S. 725, § 28.

[7] Schoonmaker v. Sheely, 3 Hill, 168, per Bronson, Ch. J.

[8] 4 Kent's Com. 232.

[9] Baskervilie v. Baskerville, 2 Atk. 279. 1 Mad. Ch. Pr. 450.

At common law, a freehold estate could not be created to commence in possession, at a future day, unless as a remainder; nor could a remainder be limited on a life estate in a term of years; nor could a contingent remainder of freehold be limited on a term of years; nor could a fee be limited on a fee on a contingency defeating the prior estate. But now, by the Revised Statutes, a future estate may be limited to commence in possession, at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.[1] And an estate for life may be limited as a remainder on a term of years, if so limited to a person in being, at the creation of such estate.[2] And subject to the rules established by the statute, a freehold estate, as well as a chattel real, may be created, to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed by the act.[3] It is further provided, that no expectant estate can be defeated or barred by any alienation, or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise;[4] except by some act or means which the party creating such estate, shall, in the creation thereof, have provided for or authorized: nor shall an expectant estate, thus liable to be defeated, be on that ground adjudged void in its creation.[5] And with regard to remainders, it is provided, that no remainder, valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect, in the same manner, and to the same extent, as if the precedent estate had continued to the same period.[6] And, in addition, the qualities with regard to descent and alienation of expectant estates are the same as those of estates in possession.[7] The foregoing provisions, and others, which have been already noticed in this chapter, have dispensed with any further need, in this state, of trustees to preserve contingent remainders in marriage settlements.[8]

[1] 1 R. S. 723, § 10.
[2] Id. 724, § 21.
[3] Id. 724, § 24.
[4] Id. 725, § 32.
[5] 1 R. S. 725, § 33.
[6] Id. § 34.
[7] Id. § 35.
[8] 4 Kent's Com. 247.

A trust to receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term; and a trust to receive the rents and profits of lands, and to accumulate the same for the purposes of the act, are expressly provided for.[1] And the better opinion is, that the trust is satisfied when the trustee pays over, in money, to the cestui qui trust, the sums which have accrued and been received by him,[2] provided the trustee is under no legal disability to receive it.

The length of time and purpose for which the rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed to be accumulated, are prescribed by statute.[3] 1. If such accumulation be directed to commence on the creation of the estate, out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time permitted by law for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority. A similar rule is adopted with respect to the accumulation of the interest of money, the produce of stock, or other income or profits arising from personal property.[4]

The absolute ownership of personal property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance, and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator.[5] In all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed by the act in relation to future estates in lands.[6]

With regard to the form of words necessary to create a trust for the separate use of a married woman, it is not essential that any particular phraseology be used. It is sufficient if there appears a clear intent to give the property to the wife for her own benefit, and to exclude her husband. When the trust is for the *sole* benefit of the wife, and the property is vested in a third person as trustee for her, and all moneys

[1] 1 R. S. 728, § 55.

[2] Gott v. Cook, 7 Paige, 539, and Leggett v. Perkins, 2 Comst. 306. Coster v. Lorillard, 14 Wend. 265, per Savage, contra.

[3] 1 R. S. 726, § 37.

[4] Id. 773, § 3.

[5] Id. § 1.

[6] Id. 773, § 2. Id. 722 et seq

received from the trust property are to be paid to her *individually*, these circumstances have been held to be equivalent to a provision for payment to the wife upon her separate or individual receipt; and are, therefore, sufficient to exclude the husband.[1]

Thus, where one Colton, being seised in fee of a tract of land in the city of New-York, executed a declaration of trust, declaring that the consideration money which had been paid for such premises was the proper money of the plaintiff, a married woman; and that the premises had been conveyed to, and were held by him, in trust for her sole use and benefit, separate and apart from her husband, as if she were a feme sole; and covenanting that he would convey the same in such manner as she should direct. And for the performance of this covenant, Colton bound himself to one Jackson, as trustee, for the separate use of the plaintiff; and afterwards conveyed the premises mentioned in the declaration of trust, for the consideration of $24,000, to Kissam, jr., who, to secure a portion of the purchase money, executed to Colton his bond, secured by a mortgage upon the whole premises so conveyed to him, conditioned for the payment of $20,000, on or before a certain day named Afterwards, and before the bond and mortgage became due, Colton assigned the said bond and mortgage to Kissam, who on the same day executed a declaration of trust, declaring that the same had been assigned to him for the sole use and benefit of, and in trust for the plaintiff, and that he would account for, and pay over to her individually, all moneys that might be received thereon. The trust thus declared was held to be clearly valid, within the Revised Statutes, it being a trust of personal property for a purpose not forbidden by law. And that the words sufficiently limited the authority to pay her individually, in exclusion of her husband.

With respect to ante-nuptial agreements, between a feme sole and her intended husband, reserving to herself the power of disposing of her own property, either real or personal, during coverture, it has been held that they will be upheld in equity, without the intervention of a trustee. Thus, where the wife, before marriage, entered into an agreement with her intended husband, that she should have power during the coverture to dispose of her real estate by will; and she afterwards devised the whole of her estate to her husband, this was held a valid disposition of her estate in equity; and the heirs at law of the wife were decreed to convey the legal estate to the devisee.[2] In the above case, the question arose between the husband, as devisee of the wife, and the heirs at law of the wife. It

[1] Stuart v. Kissam, 2 Barb. S. C. R. 493. [2] Bradish v. Gibbs, 3 J. Ch. R. 523.

is a general rule, that equity will execute marriage articles, at the instance of all persons within the influence of the marriage consideration. The husband and wife, and their issue, are all within the influence of that consideration. The husband, in regard to the devise from his wife under the power, was not a volunteer. The marriage articles were treated as founded on the consideration of marriage, which is a good and valuable consideration; and the provision in the will was founded, it was said, on the same consideration as if it had been a part of the original ante-nuptial contract. Chancellor Kent, in reviewing the leading cases on the subject, arrived at the conclusion, that it was not indispensable that the estate should have been vested in trustees; but the mere agreement entered into before marriage with her intended husband, that she should have power to dispose of her real estate during coverture, enabled her to do so.[1] It has already been shown that equity never suffers a valid trust to fail for the want of a trustee.

In a subsequent case, the question arose between the wife claiming under an ante-nuptial contract with her husband, and the creditors of the husband by judgment and execution, and the want of a trustee in the settlement was held to be no objection to the validity of the instrument and title of the wife.[2]

It was formerly supposed that the interposition of trustees was, in all cases of this sort, whether before or after marriage, indispensable for the protection of the wife's rights and interests. But though, in strict propriety, that should always be done, and it is usually done in regular and well considered settlements; yet it has been for more than a century established in courts of equity, that whenever real or personal property is given or devised to, or settled upon a married woman, either before or after marriage, for her separate or exclusive use, without the intervention of trustees, the intention of the parties may be effectuated in equity, and the wife's interest protected against the marital rights and claims of the husband. In such a case the husband will be considered the trustee, whether he was a party to the instrument under which the wife claims, or not.[3] If they can be upheld against the claims of the husband, they can equally be upheld against his creditors.[4]

Although the agreement becomes extinguished *at law*, by the subsequent marriage, if there be no trustee, yet equity supports it, and will compel the husband to perform it.[5]

[1] Bradish v. Gibbs, 3 J. Ch. R. 547.

[2] Strong v. Skinner, 4 Barb. S. C. R. 546. Meth. Epis. Church v. Jacque, 1 J. Ch. R. 65, 450.

[3] Blanchard v. Blood, 2 Barb. S. C. R. 354. Story's Eq. § 1380.

[4] Strong v. Skinner, 4 Barb. 146.

[5] Id. 552.

But though a woman, whilst she remains sole, may dispose of her own property as she sees fit, yet equity requires that she must so exercise this right as not to disappoint the just expectations of her intended husband. If, therefore, a woman, in contemplation of marriage, makes a conveyance of her own estate in trust, for her separate use, without the privity of her intended husband, or does any other act, without such privity, affecting her estate, other than upon valuable consideration, such conveyance or act, in case the marriage takes effect, will be relieved against in a court of equity, on the application of the husband, as a fraud upon his marital rights. The ground of interference is the fraud practiced upon the intended husband.[1] His marital rights are the consideration for the burdens imposed upon the husband by the marriage. These rights are of such a character that they may be the subject of fraud.[2]

Where the woman, in contemplation of marriage, and with the assent of her intended husband, made a settlement for her separate use, and the marriage did not take place, but she immediately afterwards married another person, who was not privy to the settlement, Lord Thurlow refused relief to the husband.[3] In this case, the settlement, at the time it was made, was free from fraud. The marriage, which subsequently took place, occurred but a few days after the intended one was broken off, and upon an acquaintance of a single day. The omission of the wife, under those circumstances, to communicate to the husband the previous settlement, was no fraud upon him.

The case of the Countess of Strathmore v. Bowes, last cited, was peculiar. The countess, pending a treaty of marriage with Mr. Grey, conveyed all her real and personal estate to trustees, for her sole and separate use, notwithstanding any future coverture, which settlement was prepared with the approbation of Mr. Grey. A few days after the execution, hearing that Mr. Bowes had fought a duel on her account, with an editor of a newspaper who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had no notice of the settlement. There were two bills, an original bill by Lady Strathmore to set aside a deed revoking the settlement, as having been obtained by duress, and a cross-bill, by Mr. Bowes, to set aside the settlement as against the right of marriage, and a fraud upon him. Lord Thurlow remarked, that a conveyance by a wife, even a moment before the marriage, is prima facie good; and becomes bad only, upon the imputation of fraud. "If a woman, *during the course of a treaty of mar-*

[1] Carleton v. Earl of Dorset, 2 Vern. 17. Ball v. Montgomery, 2 Ves. jr. 194.

[2] Countess of Strathmore v. Bowes, 1 Ves. jr. 27.

[3] Id.

riage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good prima facie, because affected with that fraud." And his lordship concluded, by observing, that it was impossible for a man, marrying in the manner Bowes did, to come into equity and talk of fraud. In a later case, before Lord Loughborough, his lordship said, that if a woman, previously to marriage, conveys her property, without the privity of the intended husband, it will be fraud.[1] And the same doctrine has been held in this state.[2]

In cases where the settlement is made by the wives themselves, the doctrine resulting from the cases seems to be, that if a woman, during a treaty of marriage, and without the privity of her intended husband, conveys her property to trustees in trust for her separate use, and at the same time represents to her intended husband that he should have the complete dominion over it, such conveyance would be deemed fraudulent and void, as against the husband.[3] And even without such representation, it seems that the *concealment alone* of the fact of making a settlement, pending the treaty of marriage, should be treated as a fraud.[4]

But if the settlement was honest and proper at the time it was made, being with the consent of her intended husband; but the marriage did not take place; the omission to disclose the fact of the settlement to the person to whom she subsequently married, is not a fraud upon him. As Lord Thurlow said, though the conveyance had been made with a view to a former marriage, which had not taken place, and though it would have been fraudulent if the marriage had taken place, yet it would not be a fraud upon any other husband, although the fact had not been communicated to him.[5]

It is probable that the suddenness of the match, in Lady Strathmore v. Bowes, affording no time to communicate the condition of her affairs, and the entire absence of actual fraud in the wife, together with the improvident haste of Bowes, led to the decision. The chancellor said there could be no fraud in the case; and, without fraud, there was no occasion to interfere. It cannot otherwise be reconciled with other cases.

It is a general principle, that rights dependent on the nuptial contract

[1] Ball v. Montgomery, 2 Ves. jr. 194.

[2] Wright v. Miller, 4 Barb. 608, per Strong, P. J.

[3] Carleton v. Earl of Dorset, 2 Vern. 17. 2 Cox's R. 33.

[4] Draper's case, Freem. 29. 2 Ves. jr. 194.

[5] Lady Strathmore v. Bowes, 6 Br. P. C. 427, by Tomlins. Clancy's Rights of Women, 618.

are to be determined by the *lex loci contractus*, at least so far as relates to questions of property.[1]

On this principle, where a contract of marriage between French citizens, executed in Paris, contained a clause, by which the parties mutually gave to each, and the survivor, all the estate and property, acquired and purchased, or belonging to either, at the time of his or her death, to be enjoyed by the survivor exclusively; and the husband afterwards abandoned his wife, and came to reside in New-York, where he lived many years; and having acquired a large personal estate, died intestate, without lawful issue, leaving his wife living in France, it was held, that the wife by the contract, under the law of France, took, as survivor, all the estate, to the exclusion of the husband's relatives.[2]

This principle has been applied where the husband only was a citizen of France, and the wife was a citizen of this country. In one case, an ante-nuptial contract, executed in France, in conformity to its laws, between a French citizen and an American lady, providing that if the gentleman survived her, her personal estate should be his, and her real estate should be sold, and the proceeds be his, was held to be valid, and was enforced in equity.[3]

Where natives of a foreign country, residing here, enter into an ante nuptial contract, with reference to the law of their own country, to which they agree to return and reside, and in the contract indicate an intention that it shall be governed by the laws of such country, not only as to the property then possessed by them, but also as to their future acquisitions, a court of equity will enforce it. Chancellor Walworth says: "It appears to be a well settled principle of law, in relation to contracts regulating the rights of property consequent on a marriage, so far, at least, as personal property is concerned, that if the parties marry with reference to the laws of a particular place or country, as their future domicil, the law of that place or country is to govern, as the place where the contract is to be carried into full effect. And this must certainly be the correct rule where the marriage contract in terms refers to the intended domicil of the parties as the place or country by whose laws their rights under the marriage contract, in reference to property, are to be determined."[4] In a case of this kind, the remedy to secure such property and to pro-

[1] Decouche v. Savetier, 3 J. Ch. R. 211. Hub. De Confl. Leg. lib. 3, § 9. Story's Confl. L. § 145.

[2] Decouche v. Savetier, supra.

[3] De Barante v. Gott, 6 Barb. 492.

[4] Le Breton v. Miles, 8 Paige, 265.

tect the rights of the parties to the contract must be according to the law of the country, in the courts of which such remedy is sought.[1]

After what has been said, under the head of fraud, it is scarcely necessary to add, that though the consideration of marriage is a meritorious consideration, yet a voluntary settlement after marriage, unconnected with any valid ante-nuptial agreement, by a person indebted at the time, is fraudulent and void as against creditors.[2] And this is true, whether the property consists of lands or chattels.[3] The extent and qualification of the rule belongs to another part of this treatise, and will be found considered in its proper place.

Other matters, with respect to the rights of the wife, will be noticed hereafter, when we come to treat of the subject of married women.[4]

SECTION V

OF WILLS, AND THE TRUSTS THEREIN, AND OF THE RULES OF CONSTRUCTION THEREOF.

HAVING noticed and commented upon trusts in mortgages, deeds, assignments, and marriage settlements, we proceed to the consideration of such express trusts as are usually contained in wills. These are sometimes created for the benefit of creditors, sometimes for the benefit of children or other relatives, or friends, and sometimes for public charity. Under the Revised Statutes, every estate and interest in real property, which is descendible to heirs, is devisable by will.[5]

It is not possible to embrace, in the limits of this chapter, all the cases in which relief in equity may be sought, by parties deriving interests under wills. A few only will be adverted to, in order to illustrate the jurisdiction, and to show the manner which equity deals with questions of this nature.

Before the Revised Statutes there was a distinction between a will of real estate, and a will of personal estate, with respect to the operation of the instrument, upon the subject of the devise or bequest. A will of

[1] Le Breton v. Miles, 8 Paige, 265. Jaques v. Methodist Episcopal Church, 3 J. Ch. R. 77; S. C. on appeal, 17 J. R. 548. Vail v. Vail, 7 Barb. 226.

[2] Reade v. Livingston, 3 J. Ch. R. 492.

[3] Bayard v. Hoffman, 4 J. Ch. R. 452.

[4] Post, CHAP. VIII, Sec. 2.

[5] 2 R. S. 57, § 2. 1 R. S. 725, § 35. Pond v. Bergh, 10 Paige, 140.

lands was considered in the nature of a conveyance, by way of appointment of particular lands to a particular devisee; and upon that principle, a man could only devise the lands of which he was seised at the date of the will; and after acquired land did not pass.[1] He must not only be seised at the time of making the will, but continue so seised until his death.[2] But a will and testament operated upon whatever personal estate the testator died possessed of, whether acquired before or since the execution of the instrument.[3] In respect to personal property, the testator was presumed to speak in reference to the time of his death, and not in reference to any prior or subsequent period.[4] The Revised Statutes extended the rule applicable to wills of personal estate, to devises of land, where the testator in *express* terms, or in any *other terms*, denoted his intent to devise all his real property.[5] Hence, since the statute, a will, framed according to its provisions, must be construed to pass all the real estate which the testator was entitled to devise at the time of his death. When the devise, in such case, is in *express terms of all the real estate of which the testator shall die seised*, there is no difficulty in applying the rule. But if the testator does not use *express terms*, it often becomes a question, what other terms will be equivalent to denote the intent to devise all the testator's real property.

In one case, Chancellor Walworth expressed the opinion, that our statute has not gone to the extent of the late English statute on the same subject. That statute changed the rule of law upon this subject entirely, by providing that every will shall be construed with reference to the estate, whether real or personal, or both, comprised in it; to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (Stat. 1 Vict. ch. 26, § 24. Sugd. on Wills, 172.) Our Revised Statutes have not gone so far as to put wills of real estate upon the same footing as wills of personal property in this respect; though they have unquestionably abrogated the technical rule, that the testator was incapable of devising an interest in land, or real estate, acquired subsequent to the date of the will by which he attempted to dispose of his estate.[6]

In the last mentioned case, the chancellor took a distinction between a general devise of all the testator's real estate, and a devise of all his

[1] Jackson v. Holloway, 7 J. R. 394. Jackson v. Potter, 9 id. 312. M'Kinnon v. Thompson, 3 J. Ch. R. 307. Livingston v. Newkirk, id. 312.

[2] Minuse v. Cox, 5 J. Ch. R. 450.

[3] Wind v. Jekyl, 1 P. Wms. 575.

[4] Van Vechten v. Van Veghten, 8 Paige, 104. Collin v. Collin, 1 Barb. Ch. R. 630.

[5] 2 R. S. 57, § 5.

[6] Pond v. Bergh, 10 Paige, 149.

real estate at a particular place, or within a particular district of country. In the former case, he admitted that all the real estate which the testator possessed at the time of his death passed, and, in the latter, nothing passed but what was specified. The chancellor said, that the New-York statute, already cited, proceeds upon the ground that, in a general devise of all his real estate, the testator has reference to the real estate as it shall exist at the time of his death; and that such a construction of the testamentary disposition of his property will be but carrying his intention into effect. Upon the same principle, therefore, if he devises all the real estate of a particular description, of which he shall die possessed, or which shall belong to him in a particular town or county, at the time of his death, although the devise would not be within the words of the section, (2 R. S. 57, § 5,) it not being a *general* devise of all his real estate, he thought it would be clearly within the spirit and intent of this statutory provision. But when the testator devises all his real estate *at a particular place*, or within a particular district of country, there was, he thought, good reason to suppose he meant to speak in reference to the lands he had already acquired there; and that if he intended to give to the devisee all the lands or real estate which he should afterwards purchase at that place, or within the specified district of country, there would be something in his will indicating such an intention.[1]

The New York statute was intended not only to abrogate the technical rule, that after acquired property should not pass under a general devise of all the testator's real property, but also to dispense with the necessity of words of limitation in a devise, in order to pass a fee simple. In this latter respect, Savage, Ch. J., in one case, thought the section in question contained merely the result of the common law decisions on this point.[2] Hence, where in a devise there are no words of perpetuity, or words expressive of the quantity of the estate devised, but merely words of description of the thing, and no charge upon the devisee in respect of the estate devised, either in express terms or by necessary implication, the devisee takes only a life estate.[3] But if there is a charge upon the devisee in respect of the estate devised, he takes a fee, upon the principle that he might otherwise be a loser.[4] The distinction in the cases is between a charge upon the estate, and a charge upon the devisee in respect thereof. In the former, the devisee, if there were no words of limita-

[1] Pond v. Bergh, 10 Paige, 150

[2] Van Alstyne v. Spraker, 13 Wend. 582.

[3] Van Alstyne v. Spraker, 13 Wend. 582.

[4] Id. Jackson v. Bull, 10 J. R. 148 Mesick v. New, 3 Seld. 163.

tion, took only a life estate, and, in the latter, a fee.[7] And this rule is not supposed to be altered by the Revised Statutes.

Neither before or since the Revised Statutes is any particular form of words necessary in a will, to pass a fee. The intention of the testator, as collected from the whole will, is to govern.[2] A devise of all one's right carries a fee simple to the devisee.[3] So a devise with power to convey in fee;[4] also a general devise of real estate to A., to be at her absolute disposal, passes a fee.[5] In like manner the word *estate* passes a fee.[6] But when a devise contains no words of limitation or perpetuity, the devisee can take only an estate for life.[7] Such was the rule before the statute, and Savage, Ch. J., considers that the same rule remains now.[8]

There are numerous cases where the aid of a court of equity is indispensable, in carrying into effect the intention of a testator, in the testamentary disposition of his property. Thus, where a testator charges his real estate with the payment of debts, a trust is created in favor of the creditors, who are entitled to priority over other devisees in the will. And a court of equity will, in an action by the creditors against the executors and other trustees, if there be any, compel them to raise the money for payment of debts.[9] If the court would compel them to sell for that purpose, there can be no doubt they may do themselves, without an order, the same thing.[10] The charge of debts upon an estate has been held, by eminent jurists, to be equivalent to a trust for the payment of them.[11] And if the trustee will not voluntarily do his duty, it is competent for the court, as in other cases of trusts, to compel him to do it, or to remove him and appoint another. And if there be no trustee named in the will, the executors will be treated as trustees, and the court, as has been repeatedly held, will not suffer a trust to fail for the want of a trustee.

If the will, either in general or express terms, contains a power to sell for the payment of debts, it authorizes the giving a mortgage to raise money for the same purpose. A power to sell implies a power to mort-

[1] Jackson v. Bull, 10 J. R. 151. Goodtitle v. Maddern, 4 East, 496. Doe v. Snelling, 5 id. 87. Collier's case, 6 Co. 16. Mesick v. New, 3 Seld. 163.

[2] Jackson v. Babcock, 12 J. R. 389.

[3] Newkirk v. Newkirk, 2 Caines, 345.

[4] Doe v. Howland, 7 Cowen, 277.

[5] M'Lean v. M'Donald, 2 Barb. S. C. R. 534.

[6] Jackson v. Merrill, 6 J. R. 185. Jackson v. Delancy, 13 id. 537.

[7] Jackson v. Wells, 9 J. R. 222. Jackson v. Embler, 14 id. 198.

[8] Van Alstyne v. Spraker, 13 Wend 582.

[9] Shaw v. Borrer, 1 Keene, 576.

[10] Id

[11] Bailey v. Ekins, 7 Ves. 319. Shaw v. Borrer, supra. Ball v. Harris, 4 My! & Cr. 267.

gage, which is a conditional sale.[1] The same rule, it seems, applies to a trust to raise money out of an estate to pay debts. It would, as Lord Cottenham remarked in the last case, be most injurious to the owners of the estate charged, if the trustee could effect the object of his trust only by selling the estate.[2]

It sometimes becomes an embarrassing question to determine by what words, or form of expression, an effective charge in favor of creditors may be made in a will. A will drawn with care, and by a skillful draftsman, will no doubt use express and unequivocal terms, conferring the power, or creating the trust, and declaring by whom it shall be executed. And, as in general, the personal estate is the primary fund for the payment of the debts of the testator, and the executors are the appropriate trustees for that purpose,[3] so they will generally be the persons empowered to sell the real estate, and to distribute the fund. Creditors at large cannot go into equity to compel the executors to pay their debts, upon any notion that such debts are an equitable *lien* on the estate. They can only come into equity for an account and discovery of assets, and on the ground of a *trust* in the executor or administrator to pay debts.[4]

But where plain and express terms are not used charging the real estate with the payment of debts, resort must be had to the whole will to discover the intention. Where the thing directed to be done by the executor cannot be done, without the sale of the real estate, the latter is well charged.[5] The words in a will, "after my debts and funeral charges are paid I devise and bequeath as follows," will charge the real estate for the payment of debts, if there be not personal assets enough for that purpose.[6] In an early case, where the testator, by his will, used these words; "My debts and legacies being first deducted, I devise all my estate, both real and personal, to J. S." These words were held, by the chancellor, to amount to a devise to sell for the payment of the testator's debts.[7] In a case before Lord Thurlow in 1792, it was said that a decree, "after paying debts," amounted to a charge upon the real estate for the payment of debts, and it was intimated that the leaning of the court was

[1] Mills v. Banks, 1 P. Wms. 9. Ball v. Harris, 4 Myl. & Cr. 267.

[2] Id.

[3] Hoes v. Van Hoesen, 1 Barb. Ch. R. 279; affirmed on appeal, 1 Comst. 121. McKay v. Green, 3 J. Ch. R. 56. Hawley v. James, 5 Paige, 318. Harris v. Fly, 7 id. 421.

[4] McKay v. Green, 3 J. Ch. R. 58. Anonymous, 3 Atk. 572.

[5] Bank of U. S. v. Beverly, 1 How. U. S. 149.

[6] Fenwick v. Chapman, 9 Peters, 461. Peter v. Beverly, 10 id. 564.

[7] Newman v. Johnson, 1 Vern. 45.

towards the upholding of such a charge. And in a later case, in 1798, the master of the rolls intimated that there was not a single case in which it had been held, that where the testator says "after payment of my debts," the real estate is not charged, whether specifically devised or not. The words, "after payment of my debts," mean that he will not give any thing until his debts are paid. To give these words any effect, therefore, they must charge the real estate.[2] The same doctrine was held in an earlier case. The testator, by his will, devised that his debts, legacies and funeral charges, should be paid in the first place. He then gave his sister a life estate in several lands, and remainder over. It was held that the lands were well charged with the payment of debts.[3]

As the personal estate is the primary fund for the payment of debts, the real estate is not charged unless the intention to charge it is manifest by the will. The foregoing cases show what circumstances, beyond an express charge, will be enough for that purpose. It is not sufficient that debts or legacies are directed to be paid. That alone does not create the charge, but they must be directed to be *first*, or *previously* paid, or the devise declared to be *after* they are paid.[4] Where the personal estate is not in terms exonerated, and is not absolutely bequeathed by the will, it will be deemed the primary fund for the payment of legacies, although the legacies are expressly charged upon devisees. The charge in such a case is in aid, and not in exoneration of the personal estate.[5]

A similar question, also, often arises with respect to legacies, when the aid of a court of equity is necessary to enforce the payment out of the testator's real estate. Though the real estate be charged, still the personal estate is the primary fund for the payment of legacies, and is to be first applied, before charging the real estate;[6] unless, indeed, a contrary intention is manifested by the will.[7] The devisee of real estate, charged with a legacy, is, if he accept the devise, in equity personally liable for the payment of the legacy. If he sells the land, the purchaser is entitled to insist that the legatee shall first exhaust his remedy against the devisee personally, and also against the personal estate of the testator, when that is the primary fund, before selling the real estate.[8]

Where a legacy is made a specific lien upon land, and the devisee has

[1] Kidney v. Cousmaker, 1 Ves. jr. 440. Brudenell v. Boughton, 2 Atk. 268.
[2] Shallcross v. Finden, 3 Ves. jr. 739.
[3] Trott v. Vernon, 2 Vern. 708.
[4] Lupton v. Lupton, 2 J. Ch. R. 624.
[5] Hoes v. Van Hoesen, 1 Comst. 120. 1 Barb. Ch. R. 379.
[6] McKay v. Green, 3 J. Ch. R. 56. Lupton v. Lupton, 2 id. 614.
[7] Kelsey v. Western, 2 Comst. 501.
[8] Id.

sold it in parcels to different purchasers, the lots will be charged in the inverse order of their alienation.

The charge of a legacy upon real estate, in aid or in exoneration of the personalty, may be, and frequently is, created by implication merely. If the testator gives a legacy, without specifying who shall pay it, or out of what fund it shall be paid, the legal presumption is, that he intended it should be paid out of his personal estate only; and if that is not sufficient, the legacy fails. So, if he directs his executors to pay a legacy, without giving to them any other fund than the personal estate out of which they can pay it. But where the real estate is devised to the person who by the will is directed to pay the legacy, it has frequently been decided that such legacy is an equitable charge upon the real estate so devised, although the devisee is also the executor, or is the residuary legatee of the personal estate; unless there is something in the will itself to indicate a contrary intention on the part of the testator.[2]

In cases where an equitable charge upon land devised is created by the will of the testator, a subsequent purchaser from the devisee, who is obliged to make title to the premises through the will, has constructive notice of the charge, and takes the land subject to it.[3]

There are cases where a devise is made upon condition that the devisee should pay certain legacies. In this case, should the devisee decline accepting the estate, he would not be liable to pay the legacies, but the estate would descend to the heirs, chargeable in equity with their payment.[4] In this case, it seems, the only remedy of the legatee is in a court of equity. If, however, the devisee accepts the devise, he becomes personally liable for the legacies; notwithstanding which the legacies are an equitable charge upon the estate. These principles are illustrated by the case already cited. The case was this; a testator devised certain real estate to his widow for life, or during her widowhood, and after her death, or marriage, devised the same to his nephew in fee, provided he paid the legacies mentioned in the will, and directed that the legacies should be paid by the nephew, his heirs, executors or administrators, whenever he or they should come into possession of the premises devised; it was held that a payment of the legacies was a condition of the devise; and that if the devisee or his heirs should refuse to accept the devise, the estate

[1] Jenkins v. Freyer, 4 Paige, 47. Elwood v. Deifendorf, 5 Barb. 398.

[2] Harris v. Fly, 7 Paige, 425. Alcock v. Sparhawk, 2 Vern. 228.

[3] Harris v. Fly, 7 Paige, 421.

[4] Birdsall v. Hewlett, 1 Paige, 32.

would descend to the heirs at law of the testator; but would, in equity, be chargeable with the payment of the legacies.[1]

The construction of wills often presents embarrassing questions, which call for the interposition of a court of equity to expound. Bequests of personal estate fall under the denomination of trusts. In the eye of a court of equity, executors and administrators are considered as trustees, and the persons to whom bequests are made, as the *cestui que trusts*, and in that character are peculiarly entitled to the protection of courts of equity. With respect to the undisposed residue, the executors are the trustees for the next of kin. And it is upon this notion of a trust that the equitable jurisdiction is founded, of enforcing payment of legacies and the distribution of personal estates.[2] Incidental to this jurisdiction over trusts, is the duty of giving the true construction of wills, and of compelling their execution by the executors, or other persons to whom a duty in relation thereto is confided.

It is, therefore, consistent with the plan of this treatise, that a brief review of some of the rules of construction, by which both courts of law and equity are governed in matters of this nature.

The cardinal rule in this respect is, that the intention of the testator is to govern, if consistent with the rules of law; that is, the testator cannot create a trust which the law prohibits, or suspend the power of alienation, or the absolute ownership of property, beyond the period allowed by law; nor create any other interest in property which the law repudiates. The testator is to be presumed to have used words in their natural or primary sense, unless there is something in the situation of his family or in his will to lead to a contrary conclusion. But he is not bound to use any particular form of words, to devise or bequeath a legal interest in property, or to designate the objects of his bounty; provided he uses language sufficient to show his intention. That intention is to be ascertained from the whole will taken together, and not from the language of any particular provision or clause, when taken by itself. And for the purpose of construction, a will and a codicil may be considered together, and construed as different parts of the same will.[3]

[1] Birdsall v. Hewlett, 1 Paige, 32.

[2] Farrington v. Knightly, 1 P. Wms. 545, note 1 at pp. 550, 551.

[3] Hone v. Van Schaick, 3 Barb. Ch. R. 448, 505, 506. Crone v. Odell, 1 Ball & B. 466. 1 Rob. on Wills, 355. Land v. Otley, 4 Rand. 213. Calloway v. Langhorne, id. 181. Berry v. Headlington, 3 J. J. Marsh. 321. Covenhoven v. Shuler, 2 Paige, 122. Reno's Ex'rs v. Davis, 4 Hen. & Mum. 283. Cowper v. Cowper, 2 P. Wms. 741. Dobbins v. Bowman, 3 Atk. 409. Westcott v. Cady, 5 J. Ch. R. 343.

Thus, the word "and" may be understood disjunctively for "or,' and "or" for "and," when it is clear such was the intention of the testator.[1]

When the words of one part of a will are capable of a twofold construction, that should be adopted which is most consistent with the intention of the testator, as ascertained by other provisions in the will. And when the intention is incorrectly expressed, the court will effectuate it by supplying the proper words. The strict grammatical sense is not always regarded, but the words of a will may be transposed to make a limitation sensible, or to carry into effect the general intent of the testator.[2] So one name may be substituted for another, in the construction of a will, when it is manifest, not only that the name used was not intended, but that a certain other name was necessarily intended.[3] This class of cases are, perhaps, appropriately referrible to the head of mistake, but they are applicable also under the head of construction, which we are now considering. Thus, where a testator after bequeathing several specific legacies, bequeathed the residue as follows: Thirdly, I bequeath to my brother *Cormac* Connolly, and to my two sisters Mary and Ann, whatever remains of my money after the above bequests, to be divided between them, share and share alike; and in case of the demise of either of them, to go, share and share alike, to the survivor or survivors." On the following day he made a codicil to the will, and thereby, among other things, bequeathed as follows: "To my nephew, Cormac Connolly, the son of my brother Cormac Connolly, the sum of five hundred dollars for his ecclesiastical education, which sum is to be taken from what I have bequeathed to my brother Cormac, and to my sisters Mary and Ann." The testator never had a brother named Cormac, but he had a nephew of that name, the son of his brother James, who, at the time of making the will, was pursuing classical studies in Ireland, with a view to an ecclesiastical education, and he was the only nephew of the same name. An amicable suit was instituted, to which the executors and persons named in the will were parties. The chancellor decided that the residuary bequest in the will was intended for the testator's brother James, the father of the testator's nephew, Cormac Connolly.

This case affords, also, an apt illustration of the rule already stated, that the codicil and will must be construed together, in order to ascertain the intent of the testator. By viewing them in connection, it is per-

[1] Dobbins v. Bowman, 3 Atk. 409. Thellusson v. Woodford, 11 Ves. 148. O'Brien v. Heeney, 2 Edw. Ch. R. 242. Bradhurst v. Bradhurst, 1 Paige, 343.

[2] Covenhoven v. Shuler 2 Paige, 130. [3] Connolly v. Pardon, 1 Paige, 291.

fectly obvious that the brother was the residuary legatee, and not the nephew.[1]

If a legacy, said the chancellor in the same case, was given by a testator to his brother John, and it turned out in evidence that he had but one brother, whose name was James, there could be no doubt that the latter would be entitled; because the description of *brother* in that case would alone be sufficient, and the name might be rejected as surplusage. Chancellor Kent, in one case, went further, and permitted a person not named, or described at all in the will, to take a legacy, upon evidence that she was the person intended, there being no person of the name mentioned in the will. In that case, the testatrix evidently was mistaken in the name of the legatee. The bequest was given to Cornelia Thompson, in the will, when it was shown that *Caroline Thomas* was intended.[2] In cases of this nature, the object of an action in equity is not, as in the case of a mistake in agreements, to *reform* the instrument, but it is to give to it such construction as will fulfill the purpose, and carry out the intent of the testator.

Nor is the court, in the construction of a will, restricted to the *order* in which the words are set forth in the instrument, nor to strict grammatical rules. To effectuate the intent, words may sometimes be transposed, supplied, or rejected.[3]

With respect to the meaning of technical words, it is said that *prima facie* they are to be understood in their legal sense, unless by the context, or by express words, they plainly appear to be intended otherwise.[4] But the court will abide by the settled meaning of the words, until driven out by strong, solid and rational interpretation put upon, and plain inference drawn from, the rest of the will.[5]

If the words of a will be such that they may be construed in two different senses, one of which would render the disposition made of the property illegal and void, and the other would render it valid, the court should give that construction to the language that will make the disposition of the testator's property effectual.[6]

So where a will contains distinct and independent provisions, devising

[1] Connolly v. Pardon, 1 Paige, 291.

[2] Thomas v. Stevens, 4 J. Ch. R. 607; S. P., Beaumont v. Fell, 2 P. Wms. 141. Bradwin v. Harpur, Ambl. 374. Cowen & Hill's Notes, 1368, 1369.

[3] East v. Cooke, 1 Ves. 32. Pond v. Bergh, 10 Paige, 140. Marshall v. Hopkins, 15 East, 309. Montagu v. Nucella, 1 Russ. R. 165. Doe v. Micklem, 6 East, 486. Fonereau v. Fonereau, 3 Atk. 315. Doe v. Starlake, 12 East, 515.

[4] Holloway v. Holloway, 5 Ves. 401.

[5] Deane v. Test, 9 Ves. 152, 154.

[6] Butler v. Butler, 3 Barb. Ch. R. 310 Mason v. Jones, 2 Barb. S. C. R. 230.

different portions of the testator's property, or distinct estates or interests in the same portions of the property, some of which provisions are consistent, and others inconsistent with the rules of law, the former will be permitted to stand, although the latter are declared illegal and void; unless the different provisions are so dependent on each other, that they cannot be separated. And where real estate is conveyed upon two or more trusts, some of which are legal and the others are void, or unauthorized by law, the legal estate will pass to the trustee, so far as is necessary for the purposes of the authorized trusts; notwithstanding the provision of the statute which declares, that where an express trust shall be created for any purpose not authorized by law, no estate shall vest in the trustee.[1]

Full effect should be given to the particular intent, as well as to the general intent of the testator, so far as his particular intent can be ascertained by the will, and as is consistent with the rules of law, and with his general intent; which general intent must control in a will.[2]

It sometimes happens in wills that there are clauses inconsistent with each other, and in which both cannot take effect. In such a case, it becomes the duty of the court to select one or the other. In analogy to the fact that the last will of a testator is to prevail in preference to an earlier one, the courts have adopted from necessity a similar rule, and treated the subsequent words in the will as indicating a subsequent intention; unless, indeed, there be other expressions of the will which make it apparent that the first should take effect.[3]

With regard to the use of words, not technical in their nature, the testator must be presumed to have used them in their ordinary or primary sense, unless it appears from the context that he probably used them in some other sense; or unless, by reference to extrinsic circumstances, the use of the words, in their primary sense, would render the provision of the will insensible or inoperative.[4] The application of this rule to the legatee, when not designated by name, is sometimes necessary, as well as to the other language of the will. Thus, the word "children" is sometimes used as descriptive of the persons who are to enjoy the testator's bounty. This word, in its ordinary sense, does not include grandchildren. But it may include them when it appears there were no persons who

[1] Parks v. Parks, 9 Paige, 107. Leggett v. Perkins, 2 Comst. 297, 306.

[2] Parks v. Parks, supra.

[3] Sims v. Doughty, 5 Ves. jr. 247. Constantine v. Constantine, 6 id. 102. Parks v. Parks, 9 Paige, 124. Dawes v. Swan, 4 Mass. R. 215. Sweet v. Chase, 2 Comst. 73, per Ruggles, J.

[4] Mowatt v Carow, 7 Paige, 339. Wigram on Wills, 29.

would answer to the description of "children" in the primary sense of the term, or where there could not be any such at the time or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the term children as synonymous with issue or descendants.[1]

The word "children," in its natural sense, is a word of purchase, and not a word of limitation.[2] The rule in Shelley's case was applied to limitations, in which the word "heirs" is used, which, on account of its peculiar signification, and upon the maxim that no one is an heir to the living, was construed as giving the fee to the devisee for life, when a remainder was limited to his heirs. We have already explained this rule sufficiently in the former part of this chapter, and its abrogation by the Revised Statute. But that rule was a technical one, and did not apply where other words were used to designate the persons to take in remainder after a life estate. If an express devise of lands be given to one for life, remainder to his *sons*, or his *children*, and their heirs, the devisee takes an estate for life only, and the sons or children, and not the father, take the residue of the estate in fee, by way of remainder.[3]

Where the estate is not limited to the father for life with remainder to his children, the construction of the will varies according to circumstances. If the devisee, in such a case, has children at the time of making the will of the testator, it has been held that he takes a joint estate with his children.[4] But when there are no children *in esse*, at the time of making the will, the word children, in a devise to a man and his children, has sometimes been construed a word of limitation merely, so as to create an estate tail in the devisee.[5]

In like manner the word *issue*, though sometimes construed as a word of limitation, yet, in wills, for the purpose of giving effect to the intention of the testator, it has generally been construed as a word of purchase.[6]

It sometimes happens that a will is ambiguous in its terms, and the true construction of it cannot be made without the aid of a court of equity. An important question then arises, whether the ambiguity can be explained by a resort to parol evidence, or whether it must be determined

[1] Mowatt v. Carow, 7 Paige, supra. Hone v. Van Schaick, 3 Barb. Ch. R. 488.

[2] In the matter of Sanders, 4 Paige, 296.

[3] Id. Rogers v. Rogers, 3 Wend. 503. 4 Cruise's Dig. tit. 32, ch. 23, § 30.

[4] Oates v. Jackson, 2 Str. 1172. Matter of Sanders, 4 Paige, 297.

[5] Id. Wilde's case, 6 Coke, 16. Radcliff v. Buckley, 10 Ves. 195.

[6] Champlin v. Haight, 10 Paige, 274; S. C. on appeal, 7 Hill, 246, per Bronson, J.

solely by a resort to other parts of the will. This question depends on the nature of the ambiguity, of which, according to Lord Bacon, there are two sorts. The one is called a *latent* and the other a *patent* ambiguity. The first occurs where the deed or instrument is sufficiently certain and free from ambiguity; but the ambiguity is produced by evidence of something extrinsic, or some collateral matter out of the instrument: the latter kind is such as appears in the instrument itself.[1]

A latent ambiguity, which is raised by extrinsic evidence, may be explained in the same manner. Thus, if a person grant his manor of S. to one and his heirs, so far there appears no ambiguity; but if it should be proved that the grantor has the manors both of south S. and north S., this ambiguity is matter of fact, and parol evidence may be admitted to show which of the two manors the party intended to convey.[2]

A patent ambiguity is such as appears on the face of the instrument itself. In many of these cases the apparent uncertainty may be removed by collecting the general intention from other parts of the instrument, so as to make the whole consistent, and this is a legitimate mode of explaining the ambiguity.[3] But when, after comparing the several parts of a written instrument, and collecting all the lights which the writing itself supplies, the intention of the parties still appears to be uncertain, parol evidence of their intention is not admissible.[4] The reason of this rule, as explained by Lord Bacon, is, that the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averment, and so, in effect, to make that pass without deed, which the law appoints shall not pass but by deed. It holds, generally, he adds, that all ambiguity of words within the deed, and not out of the deed, may be helped by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty.[5] The same rule governs in the case of a will. If any devise is expressed doubtfully and with uncertainty, the only construction which it is capable of receiving, is by comparing it with the other parts of the will; and declarations of the testator are not admissible to remove the apparent ambiguity, or to explain his intention. As was said by the master of the rolls, in one case, if a meaning can be collected, but if it is left

[1] 1 Phil. Ev. 531. Bac. Elem., rule 23.

[2] Id. Breckenridge v. Duncan, 2 A. K. Marshall, 51.

[3] Mann v. Mann, 14 J. R. 1; S. C., 1 J. Ch. R. 234. Storer v. Freeman, 6 Mass. R. 440.

[4] 1 Phil. Ev. 538.

[5] Bac. Elem., rule 23.

doubtful in what manner it is to take effect, the court has often no recourse but to declare the will totally void for uncertainty.[1]

But though these general rules are well settled, yet the application of them to existing cases is not always free from difficulty. A latent ambiguity sometimes relates to the person of the legatee, and sometimes to the subject of the bequest; but, in either case, if the doubt be created by extrinsic evidence, it may be removed in the same way.

The rule, however, which excludes parol evidence to explain a patent ambiguity in a deed or will, should not be carried to the extent of shutting out evidence of the situation and circumstances of the parties, for the purpose of assisting them in putting a construction on wills that are not clearly expressed.[2] Thus, for example, should the testator devise an estate for life, without saying for whose life, it would be important to know what estate he had in the property devised. For if he had only a life estate, a different interest will pass from what would follow if he were seised in fee. The testator would not be presumed to devise a greater estate than he had himself.[3] So if a man bequeath £10,000, 3 per cent consols, it will be a specific legacy, if he have that stock at the time;[4] not specific if he have it not. Evidence is thus far admissible in such case to show what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result.[5] These, and numerous other cases which may be put, tend to show the necessity of extrinsic evidence, with respect to persons and things, in order to a correct understanding of the bequest; and it has led some to suppose that there is an intermediate class of ambiguities, comprising those instances where the words are equivocal, but yet admit of precise and definite application, by resorting to the circumstances under which the instrument was made.[6] The master of the rolls, in one case, seemed to think that a patent ambiguity admitted of explanation by extrinsic evidence. "When," he observed, "the person or the thing is designated on the face of the instrument, by terms imperfect and equivocal admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and

[1] Constantine v. Constantine, 6 Ves. 102. Strode v. Russell, 2 Vern. 624. 2 Cowen & Hill's Notes, 1359 et seq. where many cases are reviewed.

[2] Druce v. Dennison, 6 Ves. 396. Judd v. Pratt, 13 id. 174. Benough v. Walker, 15 id. 514. Herbert v. Reid, 16 id. 481. Page v. Leapingwell, 18 id. 466.

[3] 1 Shep. Touch. 88. Smith v. Doe, 2 Brod. & Bing. 550, see opinion of Bayley, J.

[4] Id. Selwood v. Mildmay, 3 Ves. 310.

[5] Smith v. Doe, supra.

[6] 2 Cowen & Hill's Notes to Phil. Ev. 1358.

completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to a man by his surname, and the christian name is not mentioned; is not that a patent ambiguity? Yet it is decided that evidence is admissible. So where a gift is of the testator's stock, that is ambiguous; it has different meanings when used by a farmer and a merchant."[1]

In considering this question, Spencer, Ch. J., on one occasion said: It appears to be good law, that though an ambiguity is apparent on the face of an instrument, it cannot be explained by extrinsic evidence; yet, when a question arises as to the general intention of the parties, concerning which the instrument is not decisive, proof of independent facts, collateral to the instrument, may be properly admitted.[2] While conceding that no evidence *of an expressed intention* can be received to explain an ambiguity on the face of the instrument, and thereby to make that valid, which of itself would not avail; yet he said that, in other cases, both species of ambiguity are open to explanation by parol evidence; and that even in the case of a will, where the testator makes use of terms of equivocal import, though his declarations are not admissible, yet the circumstances of his family and fortune may be proved and taken into consideration, in order to enable the court to put a construction upon his words.

It would seem that the learned judge thought that a patent ambiguity might in some cases be explained by the proof of extrinsic facts, but not by showing the *expressed intention* of the party by whom the instrument was made. It may be doubted whether a resort to extrinsic evidence, to show the condition of things, where the instrument, whether a deed or will, was made, can be properly called an explanation of the instrument itself, in the sense contemplated by the rule. Such evidence does not tend to contradict the words of the instrument, but by putting the court in the place of the party by whom it was made, together with the surrounding circumstances, it enables it to understand the language in the same sense as the framer of it intended. If both the court and the testator, for example, can view the provisions of the will from the same point of observation, they will be apt to understand it alike. To do this, is all that is intended by introducing evidence of the state of the testator's circumstances and condition when the will was made. The case relied on by the court, in Ely v. Adams, was clearly one of a *latent* ambiguity, and

[1] Colpoys v. Colpoys, Jacob, 451. King v. Inhabitants of Laindon, 8 T. R. 379.
[2] Ely v. Adams, 19 J. R. 317. The

open to explanation upon the strictest principles, and the case itself, moreover, afforded intrinsic evidence of the parties' intention.[1] So also, the cases put in Colpoys v. Colpoys, were of a latent ambiguity.[2]

It has already been shown, under this general head, that executory trusts created by will are governed by the same rules which prevail in relation to the like trusts created by deed.[3] And we have pointed out, in the same place, the changes introduced by the Revised Statutes, which are alike applicable to executory trusts created by wills and deeds. It will not be consistent with the plan of this treatise to pursue this branch of the subject more at large.

SECTION VI.

OF LEGACIES; THE GROUNDS OF THE JURISDICTION OF COURTS OF EQUITY; AND THE DIFFERENT KINDS OF LEGACIES, WHETHER GENERAL, DEMONSTRATIVE OR SPECIFIC, AND OF ADEMPTION OF LEGACIES.

As the jurisdiction of courts of equity over legacies is referable to their general jurisdiction over trusts,[4] and as legacies are given by a will in writing, except in the case of *donatio mortis causa*, which is in the nature of a legacy, rather than a strict legacy, it will be expedient to consider the subject of legacies; and to point out briefly the different kinds of legacies, and the nature and extent of the jurisdiction by which they are enforced.

A legacy is defined to be, "some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor; or, in a codicil or last will, wherein no executor is appointed, to be paid or performed by an administrator."[5]

The word *devise* is appropriated to a gift of lands, and the word *legacy* to a gift of chattels, though both terms are used promiscuously. The word *legacy* may apply to real estate, if the intent so require,[6] and a tes-

[1] Cole v. Wendell, 8 J. R. 116. Cowen & Hill's Notes, 1360 et seq.

[2] Mann v. Mann, 1 J. Ch. R. 234.

[3] Ante. Countess of Lincoln v. The Duke of Newcastle, 12 Ves. 227, per Ld. Eldon. Attorney Gen. v. Sutton, 1 P. Wms. 754.

[4] Wend v. Jekyl, 1 P. Wms. 575. Farrington v. Knightly, id. 544.

[5] 2 Will. Ex. 694. Godolp. pt. 3, ch. 1, § 1. 2 Bl. Com. 512.

[6] Jackson v. Housel, 17 J. R. 281. Lasher v. Lasher, 13 Barb. S. C. R. 109 110.

tator's real estate has been held to pass under a will bequeathing his *personal estate*.[1]

Formerly a will or testament of chattels was good, though its publication was not attested by any witnesses, provided sufficient proof could be procured that it was subscribed by the testator, or made according to his instructions.[2] But now, in this state, by the Revised Statutes, wills of real and personal estate are put upon the same footing, in relation to the mode in which they are to be executed.[3] But with respect to the person capable of making a will, it is provided that every male of the age of eighteen years or upwards, and every female not being a married woman, of the age of sixteen years or upwards, of sound mind and memory, may give and bequeath his or her personal estate by will in writing.[4] The power of devising, or making a will that shall pass the testator's real estate, is given to all persons, except idiots, persons of unsound mind, married women and infants.[5]

In New-York the surrogate's court has a qualified jurisdiction to decree the payment of legacies.[6] But as that court is one of limited jurisdiction, and as legacies are frequently connected with trusts which that court cannnot enforce, it would seem, in general, that a court of equity, which in all cases of legacies has concurrent jurisdiction, should be resorted to in the first instance.

The former statute law of this state, and the Revised Statutes more fully, have conferred upon courts of law a jurisdiction, in certain cases, to enforce the payment of legacies.[7] But the consideration of the remedies in a court of law, and before the surrogate, does not belong to the present treatise. The jurisdiction of a court of equity in this matter is not impaired by any of the statutes, and it will be found, in general, to afford the most complete remedy in all cases; and the exclusive remedy, when the execution of complicated trusts is involved. In addition to this, as was shown in a former part of this work, when a legacy is payable at a future day, an executor may be compelled to bring the money into court, or to give security;[8] and equity will marshal the assets in favor of legatees, as between them and the heir, or creditors having liens.[9] The

[1] Doe v. Tofield, 11 East, 246. Wall v. Langlands, 14 id. 370. Roe v. Patterson, 16 id. 221.

[2] 2 Bl. Com. 501, 502. Watts v. Public Adm. 4 Wend. 168.

[3] 2 R. S. 63, § 40.

[4] Id. 60, § 21.

[5] Id. 56, § 1.

[6] 2 R. S. 91, §§ 43, 47. Id. 116, § 18. Id. 96, § 75.

[7] 2 R. S. 114, 450 et seq. 1 R. L. of 1813, p. 314, § 19. De Witt v. Schoonmaker, 2 J. R. 243. 11 Paige, 87.

[8] Lupton v. Lupton, 2 J. Ch. R. 614.

[9] Livingston v. Livingston, 3 J Ch. R 148.

remedy in these respects, in a court of law and in the surrogate's court is imperfect and defective. It is adequate only in plain cases, in which there is no other trust but to pay the legacy.[1]

Nor can an action at law be sustained to recover a legacy, until the executor has assented to it. Until such assent be given, the title of the legatee is incomplete. This results from the general principle that all the property of the testator, which the law denominates assets, to be applied and distributed as the personal estate of the testator or intestate,[2] devolves upon the executor, as the representative of the testator, upon trust in the first place to discharge the testator's debts.[3] The whole personal estate is thus in the first instance to be applied, and the executor is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to any direction in the testator's will to the contrary. This assent is defined to be the agreement of an executor or administrator that a legatee shall have the thing bequeathed unto him. And it is either *express* or *implied;* the former, when the executor or administrator, by express words, agrees to the legacy, and the latter, when the executor or administrator does not by words, but by some overt act, declare his assent that the legatee shall have the thing bequeathed to him.[4]

The assent of the executor or administrator is not necessary in the case of a devise of land. It is required only in the case of a bequest of chattels, either real or personal.[5] From the nature of the case, it is only required when the bequest is of such things as are assets in the hands of the personal representatives for the payment of debts.

If there be many executors, the assent of any one or more of them is sufficient.[6]

But though an action at law cannot be maintained against an executor for a legacy, until he has assented to it, unless there be some statutory regulation to the contrary, yet a court of equity could always enforce payment of a legacy, after it became payable, if there be sufficient assets, whether the executor assented or not.[7] This is merely compelling the executor, who with respect to the legatees is a trustee, to execute his trust, which is the appropriate province of a court of equity.

If a legacy be charged on real estate, it seems no action at law can be sustained to enforce it, but the remedy is exclusively in a court of equity.[8]

[1] Stagg v. Jackson, 2 Barb. Ch. R. 86.
[2] 2 R. S. 82, § 6.
[3] 2 R. S. 87, § 25. 1 Will. Ex. 411.
[4] Shep. Touch. 455.
[5] Id.
[6] Shep. Touch. 456.
[7] Day v. Trig, 1 P. Wms. 287.
[8] Pelletreau v. Rathbone, 18 J. R. 426. Livingston v. Livingston, 3 id. R. 189.

Nor can an action at common law be maintained for a legacy in a court of law. In the leading case, where this question was directly involved,[1] it was said by Lord Kenyon, that no action, till lately, (except one in the time of the commonwealth,) has been supported for a legacy in a court of law, and he thought the upholding such action would be attended with the most pernicious consequences. The reason why such action was maintainable at common law, at the time of the commonwealth, was, that at that time the ecclesiastical courts which had the exclusive jurisdiction of legacies were abolished, and the court of chancery did not assume jurisdiction till the time of Lord Nottingham. There would, therefore, have been a failure of justice, had courts of law declined jurisdiction.

But there are numerous other reasons why equity is the proper tribunal in these cases. If the legacy be to a married woman, the husband, if an action at law would lie, could get possession without making provision for his wife. In such a case a court of equity looks to the interest of the wife, and will not permit the husband to obtain the legacy without making suitable provision out of it for the wife and her children.[2]

It is not denied that an executor may make himself personally liable to an action at law, by a special promise to pay a legacy. Such promise is an admission of assets.[3]

Since the time of Lord Nottingham, the jurisdiction of courts of equity over legacies has not been questioned; and in cases where the legatee is proceeding to recover the legacy in a court, where full redress and protection to all persons interested cannot be given, courts of equity will restrain, by injunction, proceedings in the subordinate court, and draw to its own jurisdiction the whole subject matter. Where the legacy is a charge upon land, it follows the rule of the common law, and was not cognizable in the spiritual court in England, and is not cognizable in the surrogate's court in this state, except in peculiar cases. Where the will directs real and personal estate to be sold by the executors, and makes but one fund of the real and personal property of the testator for the purposes of the will, it seems the statute is broad enough to give the surrogate jurisdiction of the whole matter.[4]

But where the legacy is merely personal, the court follows the rule of the civil law, because personal legacies were properly cognizable in the

[1] Deeks and Wife v. Strutt, 5 D. & E. 687–690.

[2] Id. Brown v. Elton, 3 P. Wms. 202. Howard v. Moffat, 2 J. Ch. R. 206.

[3] Childs v. Monins, 2 Brod. & Bing. 460. De Witt v. Schoonmaker, 2 J. R. 243. Beecker v. Beecker, 7 J. R. 99.

[4] Stagg v. Jackson, 2 Barb. Ch. R. 86.

spiritual court, and equity always considered itself as bound to follow the rules of that court, to which the jurisdiction properly belonged.[1]

The foregoing observations are enough to illustrate the jurisdiction of courts of equity over legacies, and the grounds on which it rests. Independent of the question of trusts, which of itself is an ample source of jurisdiction, there are other elements which often enter into the question, such as the necessity of a discovery of assets, an injunction against a misapplication thereof, and an account of the administration.

It will be convenient in this place to add some observations on the dif ferent kinds of legacies, and some of the incidents to which they are subject.

Legacies, with respect to their subject matter, are either *general* or *specific;* with regard to the interest acquired by the legatee, they are *vested* or *contingent;* and with regard to the certainty of enjoyment, they are *absolute* or *conditional.* *General* legacies are sometimes called *pecuniary* legacies. A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies; as of so much money, with reference to a particular fund of payment. This kind of legacy is called by the civilians a *demonstrative* legacy; because it points to a fund out of which satisfaction may be made. It partakes of the nature of general legacies, in this, that if the fund pointed out fails, the legatee is entitled to resort to other portions of the estate; and it is so far *specific* that it will not be liable to abate with general legacies on failure of assets.[2] All legacies may be reduced to one or the other of the above kind; and we will consider together general and specific legacies

A legacy is said to be general when it is so given as not to amount to a bequest of any particular thing, or money of the testator, distinguished from all others of the same kind. A legacy is specific when it is a bequest of a *specified* part of the testator's personal estate, which is so distinguished.[3] Thus, for example, a legacy *of a diamond ring* is a general legacy, which may be fulfilled by the delivery of any ring of that kind; while a legacy of a diamond ring presented to me by A. is a specific legacy, and can only be satisfied by the delivery of the identical subject.[4] Where the testator devises to his wife all his personal estate at W., this is a specific legacy, and is the same as if he had enumerated all the par-

[1] Reynish v. Martin, 3 Atk. 333.

[2] Coleman v. Coleman 2 Ves. jr. 640, per Lord Loughborough. Robert v. Pocock, 4 Ves. 160.

[3] Bradford v. Haynes, 7 Maine R. 105.

[4] 2 Fonb. B. 4, pt. 1, ch. 2, § 5. 2 Will Ex. 739.

ticulars there.[1] So a bequest of all the testator's right, interest and property in thirty shares of the Bank of the United States, is a specific legacy.[2] So a bequest of "the proceeds of a bond and mortgage I hold against S." is a specific legacy.[3] So a bequest of S. of the amount of his bond and mortgage to the testator, is a forgiveness of the debt, or a specific legacy and not a pecuniary legacy.[4]

The distinction between general and specific legacies is of the utmost importance; for as it will appear more fully hereafter, if there be a deficiency of assets, a specific legacy will not be liable to abate with general legacies; while on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So though specific legacies have in some respects the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage.[5]

There are two kinds of gifts included under the description of specific legacies. The first is where a particular chattel is specifically described and distinguished from all other things of the same kind; and the second, where something of a particular species is bequeathed, which the executor may satisfy by delivering something of the same kind, as a horse, a diamond ring, &c. The first kind may perhaps be more properly called an individual legacy; and if the thing so bequeathed be not found among the testator's effects, it fails.[6] It is to the first kind that the doctrine of ademption applies. If, for an example, a specific debt be given, and the testator in his lifetime receive payment of the debt, the legacy is gone.[7] But this doctrine of ademption does not apply to the second class, where the legacy is rather demonstrative, and merely points to the fund out of which it is to be paid.[8]

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity, in the nature of specific legacies; as of so much money, with reference to a particular fund for payment. This kind of a legacy is called by the civilians a *demonstrative* legacy, and it is so far general, and it differs so much in effect from one properly *specific*, that if the fund

[1] Sayer v. Sayer, 2 Vern. 688.
[2] Walton v. Walton, 7 J. Ch. R. 262.
[3] Gardner v. Printup, 2 Barb. S. C. R. 83.
[4] Sholl v. Sholl, 5 Barb. 312.
[5] Ashton v. Ashton, 3 P. Wms. 384. Walton v. Walton, 7 J. Ch. R. 267.
[6] 2 Fonb. Eq. B. 4, pt. 1, ch. 2, § 5, note o. Selwood v. Mildmay, 3 Ves. jr. 310. Purse v. Snaplin, 2 Atk. 416.
[7] Walton v. Walton, 7 J. Ch. R. 262. Id.

be called in, or fail, the legatee will not be deprived of his legacy, bu be permitted to receive it out of the general assets.[1]

In a recent case the rules on this subject were thus applied by the supreme court, in the following case: The will of the testator contained this legacy: "My wife having now in her possession eight hundred and fifty dollars, I direct my executor to pay her one hundred and fifty dollars more, so as to make her the sum of one thousand dollars; my meaning and intention is to give her one thousand dollars." This was held to be a general legacy of one thousand dollars; eight hundred and fifty dollars of it, referred to as being in the hands of the legatee, being demonstrative, and the onus lay with the executor to show that the legatee had at the death of the testator that sum in her hands. And it was held further, that if the testator in his lifetime withdrew the said sum of $850, and invested it in a different way, it did not operate as an ademption of the legacy.[2]

The courts are in general averse from construing legacies to be specific; and the intention of the testator that they should be so, must be clear.[3] If, says Chancellor Kent, there be the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund only, as that out of which he meant it to be paid, it shall be construed pecuniary, so that the legacy may not be defeated by the destruction of the security.[4]

The cases both in the English and American books turn often upon nice and shadowy distinctions between a general and specific legacy; and it must be conceded that they cannot all be reconciled.

As the leaning of the courts is thus towards the construction which will render the legacy *general*, rather than *specific*, it is incumbent on the party claiming the legacy to be specific, to show such unequivocal expressions in the will, as will leave no room to infer an intention that the legacy should be general. Bank stock, government securities, bonds and mortgages, and the like, are frequently the subject of specific bequest. When they are so clearly indicated as to distinguish them from all other things of the like kind, and the *corpus* is given, and it is not merely

[1] Enders v. Enders, 2 Barb. S. C. R. 366. Touch. 433. 2 Will. Ex. 790. Ellis v. Walker, Ambl. 310. Chaworth v. Beach, 4 Ves. 555. Gillaume v. Adderly, 15 Ves. 384. Mann v. Copland, 2 Mad. Ch. R. 223. Fowler v. Willoughby, 2 Sim. & Stu. 354. 1 Cond. Ch. R. 493, S. C. Wilcox v. Rhodes, 2 Russ. 452. 3 Cond. Ch. R. 195, S. C.

[2] Enders v. Enders, supra.

[3] Ellis v. Walker, Ambl. 310. Fcote, appellant, 22 Pick. 302. Briggs v. Hosford, id. 209. Enders v. Enders, 2 Barb. S. C. R. 367.

[4] Walton v. Walton, 7 J. Ch. R. 363.

pointed to as the source from which satisfaction of the legacy can be obtained, it is specific.

In the earlier cases the rule seems to have been, when stock was bequathed, that if the testator owned the stock described, at the time of making the will, the bequest must be considered specific. Thus, in an early case,[1] the testator bequeathed to his two daughters "two thousand seven hundred and two pounds three shillings, capital stock in the Bank of England, and two thousand pounds sterling capital stock in the English East India Company, to be equally divided between them." At the time of making the will the testator had the precise amount of each kind of stock mentioned in the will, but before his death sold seven hundred and two pounds three shillings of his bank stock, so that at his death he had only two thousand pounds of each kind of stock. The legatees insisted that the legacies were *general*, and that they had a right to have the amount made up out of the residue of the personal estate of the testator. On the other hand the executors insisted that the legacies were specific, and that the sale by the testator, in his lifetime, of a portion of the bank stock, was an ademption *pro tanto* of the legacy. The court so held, upon the ground that the testator had the identical stock bequeathed at the time the will was made. In this case there was no other circumstance appearing on the face of the will to indicate an intention that the legacies were specific, than the possession by the testator, at the time he made his will, of the identical *corpus* or subject of the legacy; and that was held enough for that purpose. This doctrine seems to have been followed or recognized in many other cases.[2] It has also been followed in Massachusetts.[3] In some of the cases there was no additional circumstance to raise or qualify the intention of the testator. It was presumed, because the testator had the precise thing which he bequeathed, that the bequest was a specific bequest of that thing, and that the legacy was adeemed by the destruction of the thing, or by the testator's parting with it before his death. Ademption is a necessary incident to a specific legacy. By parting with the thing bequeathed in his lifetime, the testator indicates an intention that the legacy shall fail. But independently of intention, the ademption is in general a rule of law, and the legacy is gone, with the destruction of its subject, or its ceasing to be a part of the testator's effects. But this rule, however, does not apply to the variation

[1] Jeffereys v. Jeffereys, 3 Atk. 120.

[2] Selwood v. Mildmay, 3 Ves. jr. 310. Ashburner v. McGuire, 2 Bro. Ch. R. 108. Badrick v. Stevens, 3 id. 431. Innes v. Johnson, 4 Ves. 569. Fryer v. Morris, 9 Ves. 360. Ashton v. Ashton, 3 P Wms. 384.

[3] White v. Winchester, 6 Pickering, 48. Foote, appellant, 22 id. 299.

of the testator's interest in the thing bequeathed, produced by operation of law, and without any act on his part indicating an intention to adeem the legacy.[1] Thus, where the bequest was of bank shares in the Bank of the United States, the charter of which expired, and the funds were conveyed to trustees, those funds retained the character of the original bequest, and were substituted for it.[2]

On the other hand, there are cases which hold that the mere possession by the testator, at the date of his will, of stock, &c. of equal or larger amount than the legacy, will not make the bequest specific when it is given *generally* of stocks or annuities,[3] or of stocks or annuities *in* or *out* of particular funds,[4] without further explanation. The distinction goes upon the ground that the testator meant only to direct his executor to purchase, with his general estate, so much stock, &c. in the fund described. And therefore the description fails to have that precise character which seems to be essential to a specific legacy. So a legacy of £1000 *out* of my reduced bank annuities is held a general pecuniary legacy, and not specific.[5] Such a legacy is at most a demonstrative legacy; or in other words, it is in the nature of a specific legacy. It points to the fund *out* of which it is to be made, but is not a specific legacy of the fund itself.

The doctrine that the mere possession by the testator of the exact thing bequeathed, at the time of making the will, does not of itself constitute a specific legacy, was carried to its furthest extent in a recent case in the New-York court of appeals.[6] In that case, the testator, at the date of his will and at his death, was the owner of 360 shares of bank stock standing in his name in the Cayuga County Bank. He gave by his will the whole of that stock, to his wife and a female relative. The language of the will was thus: "Second, I give, devise and bequeath unto my wife U. S., 240 shares of bank stock in the Cayuga County Bank, at Auburn; also all my household furniture, books, wearing apparel. All of which property and bank stock above mentioned are to be delivered to her as soon as may be after letters testamentary shall have been granted and issued on this will, and in lieu of dower. Third, I give, devise and bequeath to H. S. G., one hundred and twenty shares of stock in the Cayuga County Bank, at Auburn, to be transferred to her as soon as letters testamentary shall be issued and granted on this will." There were other legacies in the will,

[1] Walton v. Walton, 7 J. Ch. R. 265. Gardner v. Printup, 2 Barb. S. C. R. 83.

[2] Id.

[3] Webster v. Hale, 8 Ves. 410. Wilson v. Brownsmith, 9 id. 180.

[4] Purse v. Snaplin, 1 Atk. 415 and notes.

[5] Kirby v. Potter, 4 Ves. 748. Dean v. Test, 9 id. 146.

[6] Tifft v. Porter, decided in 1853, 4 Seld.

but none which tended to explain either of the above. The supreme court in the seventh district held the above legacies to be specific, and that the legatees were entitled to the dividends declared and accruing thereon from the death of the testator. The court of appeals reversed that judgment, and held the legacies to be general and not specific.

There are some English cases, in modern times, that have gone to the extent of the New-York court of appeals, in Tifft v. Porter.[1] But it is not intended, in this connection, to review, or to attempt to reconcile all the cases on this subject.

A legacy bequeathed to be paid *out* of a particular debt is not a regular specific bequest, *but in the nature of a specific legacy*, as has been already noticed. Such legacies do not fail in consequence of the non-existence of the fund out of which they were directed to be paid, but are entitled to be satisfied out of the general assets of the testator. They have, however, one of the incidents of specific legacies, in this, that they have precedency of payment out of the debt or security to which they refer.[2]

A devise of land is specific;[3] and so also is a bequest of a term for years.[4] Such was the former rule. But since the statute has placed real and personal property upon the same footing, to a great extent, by removing the technical difficulty of devising after acquired land, it is considered that real estate may be, as well as personal, the subject of general bequest or devise.

SECTION VII.

OF VESTED AND CONTINGENT LEGACIES, AND OF LAPSE.

WE will now proceed to make some observations on legacies, vested and contingent; and under this head we will notice the doctrine of *lapse*, with reference to legacies. A legacy is not said to be vested until the the interest of the legatee is so fixed as to be transmissible to his personal representatives, in case he should die before the legacy becomes payable.

The general principle with respect to the doctrine of lapse is that if

[1] Sibley v. Perry, 7 Ves. 522. Wilson v. Brownsmith, 9 id. 180.

[2] Roberts v. Pocock, 4 Ves. 150.

[3] Forrester v. Leigh, Ambl. 173.

[4] Long v. Short, 1 P. Wms. 403.

the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee.[1] This is the necessary result of the rule, that a will does not take effect until the death of the testator.[2]

With respect to the vesting of legacies, a distinction is made between such as are payable out of real or personal estate, or out of both funds. As has already been shown, legacies are primarily payable out of the personal estate, though the real estate be charged.[3] We shall first consider those which are payable out of the personalty, and then point out the distinction between them, and such as are payable out of the realty, or chargeable upon both funds.

As a general rule, legacies are vested by the assent of the executor, immediately on the testator's death, if given generally.[4] And it has been established from the earliest periods, both in the ecclesiastical courts and court of chancery in England, that unless the legatee survive the testator, the legacy is extinguished; neither can the executors or administrators of the legatee demand the same.[5] But the New-York Revised Statutes have altered this rule, when the devise or legacy is in favor of a child or other descendant of the testator. It is thus enacted:[6] "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive the testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate." If, therefore, the devise or legacy be to a person other than a child, or other descendant of the testator, or if the child or other descendant of the legatee or devisee do not survive the testator, the common law rule still prevails, and the legacy lapses.

A legacy may lapse by the death of the legatee *before* the testator, and it may lapse by the death of the legatee *after* the death of the testator. We shall notice a few cases under each of these heads. Swinburne puts the case of the testator and legatee being drowned in the

[1] Androvi v. Poilblanc, 3 Atk. 299. Birdsley v. Hewlett, 1 Paige, 32.

[2] Bac. Abr., Leg. E.

[3] McKay v. Green, 3 J. Ch. R. 56. Lupton v. Lupton, 2 id. 614. Hoes v. Van Hoesen, 1 Comst. 120.

[4] Chandos v. Talbot, 2 P. Wms. 610.

[5] Went. Ex. 436. Swinb. pt. 7, § 23. 1 Rep. 156.

[6] 2 R. S. 66, § 52.

same ship, or both being struck to death by the fall of a house, in which case he lays it down, that as they both died at the same time, the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee. In a modern case, in the prerogation court,[1] a husband had appointed his wife executrix and residuary legatee, and he and his wife were drowned in the same ship; the contest was whether administration of the estate of the husband *cum testamento annexo* should be granted to the next of kin of the testator, or the next of kin of the wife as residuary legatee. By the practice of the ecclesiastical courts, if the wife had lived to be entitled as a residuary legatee, her next of kin would have had a right to the administration in preference to the next of kin of the husband. But Sir John Nicholl held, that the next of kin of the husband had a *prima facie* right, and, therefore, that the *onus* of proof lay on the party who claimed derivatively from the residuary legatee, to show that she survived, so as to prevent the lapse of the legacy; and as no satisfactory evidence was adduced for that purpose, the court decreed the administration to the next of kin of the husband, as being clearly entitled, on the assumption that he and the wife perished at the same moment.

The bequest by a creditor to his debtor, of the amount of his debt, may be a mere release of the debt, or it may be a legacy, and subject to the ordinary consequences of lapse by the death of the legatee before the testator, depending on the phraseology of the will. In one case, where the language of the will, after giving various other legacies, which were charged upon the testator's real estate, was thus: "I give and bequeath to my brother J. S. the amount of a certain bond and mortgage which was executed by him and wife to me, on, &c. for $656; also the interest on the same. Also the amount of two notes I hold against him," describing them. This was held to be a forgiveness of the debt, and that it was not the intention that the legatee should share any portion of the real estate, upon which the other legacies were charged.[2]

If such bequest be a legacy and not merely a release of a debt, the death of the legatee before the testator occasions the legacy to lapse, and leaves the debt still operative against his estate. Thus, where the words of the will were, "I devise to my brother £2000. I also return him his bond for £400, with interest due thereon, which he owes me;" and the brother having died in the lifetime of the testator, the question was

[1] Taylor v. Diplock, 2 Philm. 261. Wright v. Sarmuda, or Gen. Stanwix's case, in notes to same.

[2] Sholl v. Sholl, 5 Barb. 312.

whether the disposition of the bond by the will amounted to a release, or was only a legacy, and therefore lapsed. Lord Loughborough held that it was a legacy, and that it had lapsed.[1]

Nor does it alter the rule if the legacy expressly contains words of limitation. Thus, where a legacy is given to a man, his executors, administrators and assigns, if, in such case, the legatee dies in the life of the testator, though the executors are named, yet the legacy is lost; for the words executors, administrators and assigns are mere surplusage, inasmuch as they would by law have taken the legacy in succession, whether named or not.[2] It was admitted, in that case, that a will might be so penned as that the executors and the legatee should have the legacy, though the legatee died in the lifetime of the testator.; yet it ought to appear in the will plainly, and by direct words, that that was the testator's intention. And though a will could not inure as a release, even supposing it to be sealed and delivered, for want of its taking effect in the testator's lifetime, yet, provided it were expressed to be the intention of the party that the debt should be discharged, the will would operate accordingly.

It is the established rule of courts of equity that a testator is never to be supposed to mean to give any thing but to those who shall survive him, unless the intention is perfectly clear. Where the fund is given to one for life, and after the death of that person to several others, and in case of their death to their representatives, there is no reason to presume an intention, that it shall not lapse by the death of the legatee in the life of the testator. It is impossible, without transgressing every rule as to vesting, to hold a legacy vested, when the legatee does not live to take the benefit under the testator's will.[3] So, if a legacy be given to a man, and directed to be paid to him or his executors, or administrators, or personal representatives, or to his heirs, at the end of a year after the testator's death, and the legatee die before the testator, the legacy intended for him will lapse.[4]

In Pennsylvania, where there is a law similar to that of this state relative to the lapse of legacies and devises, it has been held that a bequest to a niece and her *heirs*, became lapsed by the death of the legatee before the testator. The court held that the word "*heirs*" could not operate in favor of the "*issue*," for which alone the statute provided. The Pennsylvania act prevented a lapse of a legacy bequeathed to *a child or other lineal descendant* if the legatee die before the testator, leaving a child or

[1] Maitland v. Adair, 3 Ves. 231.
[2] Elliot v. Davenport, 1 P. Wms. 83.
[3] Corbyn v. French, 4 Ves. 435.
[4] Tidwell v. Ariel, 3 Mad. Ch. R. 403.

other lineal descendant, who survived the testator.[1] This is substantially like the New-York statute.

The general rule with respect to the lapse of a legacy or devise can be controlled in cases not within the statute, by the declared intention of the testator that the legacy shall not lapse, and by the substitution of the executors or administrators of the legatee. Thus, in a case before Lord Hardwicke,[2] the testatrix bequeathed as follows: "I give and devise the several legacies and sums following, which I will shall be paid to the several persons hereinafter named, and that if any of those persons should die before the same become due and payable, I will that they, or any of them, shall not be deemed lapsed legacies." She then particularized the several legatees, and said, "to Ann the wife of Richard Wensley and to his executors, or administrators, I give the sum of fifty pounds." Ann died in the lifetime of the testatrix, and her husband administered to her. The question was whether the legacy lapsed by reason of the death of the legatee first named. Lord Hardwicke determined in the negative, and said that the testatrix expressly provided against the lapsing, "if Ann died before her, for she says, 'if any of these persons die before the same become due or payable, I will that they or any of them shall not be deemed lapsed legacies,' and subsequently to this devises 'to Ann and to her executors and administrators fifty pounds,' so that in case of her death before the testatrix, other persons are named to take.'" His lordship seems to have thought that unless the executors or administrators had been named in substitution for the legatee first named, the general rule would have prevailed, and the legacy become lapsed on the death of the legatee before the testator. For he says, if a man devises a real estate to J. S. and his heirs, and signifies or indicates his intention, that if J. S. die before him, it should not be a lapsed legacy, yet unless he had nominated another legatee, the heir at law is not excluded, notwithstanding the testator's declaration. So in the devise of a personal legacy to A., though the testator should show an intention that the legacy should not lapse in case A. die before him, yet this is not sufficient to exclude the next of kin. The same doctrine has been followed in subsequent cases.[3]

Under the New-York statute it is not necessary, to prevent a lapse, that the testator should indicate his intention to that effect. The statute prevents the lapse of the legacy, if it be to a child or other descendant of the testator, and the legatee dies before the testator, leaving a child or

8 Serg. & R. 71.
Sibley v. Cook, 3 Atk. 572.
Toplis v. Barker, 2 Cox, 12[illegible]. Bridge v. Abbott, 3 Bro. C. C. 224. Elliott v. Davenport, 1 P. Wms. 86.

other descendant, who survives the testator. In other cases the rule of the common law prevails.

It is laid down by elementary writers on this subject,[1] that if a legacy be so given as to be payable at the testator's death, the period of receipt not being expressly postponed by him, and if the form of bequest be to the legatee *or* his personal representatives, the legacy will not lapse by his death before the testator; and for these reasons: There is no period at which the representatives can take, as intended by the will, except in consequence of the legatee dying in the lifetime of the testator; the testator's intention, therefore, in naming the representatives, must have been to guard against a lapse by the death of the legatee before him. The intent is as manifest as if actually expressed; and since persons are designated to take the legacy upon the happening of that contingency, there is an union of the two circumstances, which are required, and are sufficient to prevent the lapsing of the legacy. These two circumstances are the expressed intention of the testator, and the substitution of the executors or administrators.

In case a legacy be given to two or more persons jointly, and one of them dies before the testator, there is no lapse, but the survivor takes the whole.[2] In the case of a joint devise or legacy, if for any reason one of the joint tenants cannot take, the other shall have the whole.[3]

A different rule prevails where the legacy is to several as tenants in common, as where an aggregate fund is to be divided amongst them, *nominatim*, in equal shares, if any of them die before the testator, what was intended for them will lapse into the residue.[4]

Where a legacy is given to a class, as to the children of A., and no period is fixed for its distribution, it is considered as due at the death of the testator, and none but children who were born or begotten before that time are entitled to share in it. But if the legacy be payable at a certain period after the death of the testator, all the children who are *in esse* at that time will be entitled to share.[5] A bequest to a class, in equal shares, the fund to be invested and paid to them severally, as they become of age, vests only in those who are living at the testator's death.[6] Of course the death of one of the class before the death of the testator will occasion no lapse, but those of the described class who survive will take the whole.

[1] 1 Rop. Leg. 410. 2 Will. Ex. 761.

[2] Buffar v. Bradford, 2 Atk. 220. Mosley v. Bird, 3 Ves. 628.

[3] Dowset v. Sweet, Ambl. 175.

[4] Man v. Man, 2 Str. 905. Page v. Page, 2 P. Wms. 489. Bagswell v. Dry, 1 id. 700. Marsh v. Wheeler, 2 Edw. 156.

[5] Jenkins v. Fryer, 4 Paige, 47.

[6] Collin v. Collin, 1 Barb. Ch. R. 630.

If a legacy be given to one for life, with remainder over, and the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator.[1]

Having noticed some of the cases with reference to the lapse of legacies, by the death of the legatee *before* the testator, we will proceed now to consider others where legacies lapse by the death of the legatee *after* the death of the testator.

In general, it may be observed, that the court favors the vesting of interests,[2] especially of a *residuary bequest*, in order to prevent an intestacy.[3] It has already been remarked that legacies, if given generally, are vested by the assent of the executor, immediately on the death of the testator.[4] The statute directing that no legacies shall be paid by any executor or administrator, until after the expiration of one year from the time of granting letters testamentary, or of administration, unless the same are directed by the will to be sooner paid,[5] is merely in affirmance of the common law, and is for the convenience of the executor, and does not prevent the interest vesting, immediately on the testator's death.[6] Hence, if the legatee happens to die within the year, his personal representative will be entitled to the legacy. Nevertheless, the intention of the testator, that the gift shall not vest in the legatee, until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident.[7]

But when a future time for the payment of the legacy is defined by the will itself, the legacy will be vested or contingent, according, as upon construing the will, it appears whether the testator meant to annex the time to the *payment* of the legacy, or to the *gift* of it.[8]

In seeking for the intention of the testator in this respect, courts of equity have borrowed from the civil law two rules of construction: 1. That a legacy to a person generally, *to be paid* or *payable* at the age of twenty one, or at any other definite period, confers such a vested interest in the legatee, on the death of the testator, that if the legatee, surviving the testator, dies before the age of twenty-one, or the happening of the specified event, the legacy goes to his executors or administrators; upon the principle that it is *debitum in presenti*, though *solvendum in futuro*. The *time* in this case is annexed to the *payment* and

[1] Hardwick v. Thurston, 4 Russ. 380–383. Bac. Abr., Leg. E. p. 240.

[2] Prescott v. Long, 2 Ves. 690

[3] Bolger v. Machell, 5 Ves. 509. Booth v. Booth, 4 id. 407.

[4] Chandos v. Talbot, 2 P. Wms. 610.

[5] 2 R. S. 90, § 43.

[6] Garthshore v. Chalie, 10 Ves. 13.

[7] Law v. Thompson, 4 Russ. 92.

[8] Andrews v. N. Y. Bible and Prayer Book Society, 4 Sand. S. C. R. 173, 174, per Duer, J.

not to the *legacy*. The effect, with respect to the vesting of the legacy, is the same as if it stood singly, and no time of payment was mentioned. The direction of the will as to time of payment, whether longer or shorter, is merely a modification of the rule, which the law would annex to it, if no time of payment had been prescribed by the testator. 2. If the words "payable" or "to be paid" are omitted, and the legacy is given to the legatee *at twenty-one*, or, *if* or *when* or *provided* he shall attain twenty-one or any other definite period, those expressions annex the time to the substance of the legacy, and make the legatee's title to it depend on his being alive at the time fixed for its payment. It follows that if the legatee dies before that time happens, although he survives the testator, the legacy is lapsed. The legatee, in that case, plainly has no interest which can be transmitted to his personal representatives.[1]

A few illustrations of the first rule will be given, showing that the legacy is vested, when the bequest is in terms immediate, and the payment alone is postponed. Thus, where the testator bequeathed to his son £400, *to be paid to him* at the end of one year after his (the testator's) death, and the further sum of £100 at the death of his mother: the son died before his mother; the question was, whether he took a vested interest in the £100. And Lord Hardwicke held that he did, observing that the legacy of that sum was plainly vested, and the time of payment only postponed; for the former words, "*to be paid*," were to be carried on, as they would clearly be, if turned into any other language.[2]

In another case, a legacy was given to an apprentice, *to be paid to him* within six months *after* he should have fully served out his apprenticeship. The legatee, instead of serving out his time, ran away from his master, and died intestate, after the period of his apprenticeship expired. The court decreed the legacy to his administrator, with interest from the end of six months, after the expiration of the apprenticeship; and the house of lords confirmed the decree.[3]

The foregoing, and other cases to the like effect, are approved by the supreme court of this state in a case presenting the same principle, and affording an apt illustration of the rule.[4] In that case, the testator, after bequeathing £3000 to trustees in trust to pay the interest to M. H. dur-

[1] Cricket v. Dolby, 3 Ves. 15. 2 Vern. 199. Hanson v. Graham, 6 Ves. jr. 239. Attorney General v. Milner, 3 Atk. 114. Lowther v. Condon, 2 Atk. 128. Sweet v. Chase, 2 Comst. 73. Tucker v. Ball, 1 Barb. S. C. R. 94. Burrill v. Schell, 2 id 458, 470. Bolger v. Mackell, 5 Ves. 509. Perry v. Rhodes, 2 Murphy, 140. Marsh v. Wheeler, 2 Edw. 156.

[2] Jackson v. Jackson, 1 Ves. sen. 217.

[3] Sidney v. Vaughn, 2 Bro. P. C. 254.

[4] Burrill v. Sheil, 2 Barb. S. C. R. 458 470.

ing her natural life, and on her death to the sister of the testator, S. F., during her natural life, and on her death he bequeathed the said three thousand pounds "to the surviving issue of his said sister, share and share alike, *to be at their own disposal* as soon as they shall have respectively and severally attained the age of twenty-five years, the interest to be paid to them until they shall have severally attained the age of twenty-five years aforesaid." The court held, on this point, that the principal sum was well given to the surviving issue of S. F., the testator's sister, immediately on her death, to be at their own disposal as they should respectively attain the age of twenty-five years; and, until that age, the executors and trustees were authorized to pay over the interest to the said issue. The words, "to be at their disposal," taken in connection with the disposition of the interest, conferred, in the opinion of the court, on the surviving issue, a vested interest on the death of S. F., the testator's sister; or, in case of her death before M. H., the first legatee or life, on the death of the latter. The legacy thus vested in interest on the death of the testator, though not in full enjoyment until the death of the legatees for life, and the attaining of the age of twenty-five years by the legatees respectively. The court, in this case, considered that the disposition of the interest was a plain indication of the testator's intention that the legatee should at all events have the principal.[1]

But this rule we are considering must nevertheless yield to the *clear* intention of the testator to the contrary, if from the whole scope of the will it appears, beyond reasonable doubt, that the testator did not intend the legacy to vest until the period of payment. It is a rule adopted from the practice of the ecclesiastical courts, and is applicable only to personal legacies, but not as to real estate; it is not much favored, and is not to be extended.

The other positive rule, namely, when the words "payable," or "to be paid," are omitted, and the legacy is given "*at*" twenty-one, or *if*, *when*, or *provided* the legatee attains twenty-one, or any other definite period. In this case the legacy is contingent, and does not vest, and is not transmissible to the executors or administrators of the legatee, unless he survives the period fixed by the will. A few cases on this subject will be given as illustrative of the rule.

Thus, in an early case, the testator gave to his son £200 *at his age of twenty-one years*. The son died under twenty-one; and it was deter-

[1] Fornereau v. Fornereau, 3 Atk. 645. Hoath v. Hoath, 2 Bro. C. C. 3. Hanson v. Graham, 6 Ves. 239.

[2] Mackell v. Winter, 3 Ves. 543.

mined that the legacy never vested in him, as the age was annexed to the *gift*, and not to the time of the *payment;* consequently it was not an interest transmissible to the executor or administrator of the legatee.[1]

In another case,[2] the bequest was in these words: "I give £100 a piece to the two children of J. S., *at the end of ten years after my decease.*" The children died within the ten years; and Lord Chancellor Cooper held that the legacy lapsed, and did not go to the executors of the children. He took a distinction between a case where the bequest is to take effect at a future time, and where the *payment* is to be made at a future time. And he said, that wherever time is annexed to the legacy itself, and not to the payment of it, as in that case, if the legatee dies before the time of payment, it is a lapsed legacy.

In a leading case on this subject, and which has been repeatedly acted upon, it was clearly held, that the expressions, "at twenty-one," or "if," or "when" he shall attain twenty-one, or "if he shall survive B.," are contingent, and that in each of those cases if the legatee dies before the time, the legacy lapses.[3] In all these cases the time of payment is annexed to and forms part of the gift; the attaining the age of twenty-one years, or surviving B,. is a condition precedent, the performance of which is necessary to vest the legacy.[4]

The foregoing rule, though well settled, is open to a similar exception to that mentioned under the other rule, viz, that if the *clear* intention of the testator, deducible from the whole will, shows that the legacy shall vest, notwithstanding the form of words, if standing alone, would indicate the contrary, the intention shall prevail, when it is consistent with the rules of law.

The foregoing cases are all recognized by the court of dernier resort in New-York, in an important case, which also establishes the exceptions to the rule.[5] The doctrine was thus stated in that case: where the gift of a legacy is absolute, and the *time* of payment only postponed, as where the sum of $1000 is given to A., to be paid *when* he shall attain the age of twenty-one years, the *time* not being of the substance of the gift, postpones the payment, but not the vesting of the legacy; and if the legatee die before the period specified, his representatives are entitled to the money. But where the legacy is given *when* the legatee shall attain, or *provided* he does attain the age of twenty-one years, *time* is of the sub-

[1] Cruse v. Barley, 3 P. Wms. 20.

[2] Snell v. Dee, 2 Salk. 415.

[3] Stapleton v. Cheele, Prec. Chan. 317. Hanson v. Graham, 6 Ves. jr. 245. Fornereau v. Fornereau, 3 Atk. 645.

[4] Id. Goss v. Nelson, 1 Burr. 227, per Ld. Mansfield. Hodges v. Peacock, 3 Ves. 735.

[5] Patterson v. Ellis, 11 Wend. 259, 268 et seq., per Savage, Ch. J.

stance of the gift, and the legacy does not vest until the contingency happens.

But even where the legacy is given *when* the legatee attains the age of twenty-one years, if the devisor directs the interest of the legacy to be applied in the mean time for the benefit of the legatee, there being an absolute gift of the interest, the principal will be deemed to have vested.[1] So the legacy will be deemed *vested*, if it be left to the discretion of a trustee to pay the legacy *sooner* than the time specified in the will; and it seems that the mere appointment of a trustee for the legatee during the minority, will have the same effect.

But other circumstances, besides giving the intermediate interest to the legatee, will indicate the intention of the testator that the legacy shall vest, though the form of the bequest, if standing alone, would not be sufficient for that purpose.

Thus, where a legacy of £50 was given to A. at twenty-one, or marriage, and £50 to B. at twenty-one, or marriage, and in the close of the will the testator added, "If any legatee dies before his legacy is payable, the same shall go to the brothers and sisters of such legatee:" A. dying in the lifetime of the legatee, it was adjudged no lapsed legacy, but that it should go to the sister.[2]

If there be a bequest to a person payable at a certain period, which may happen either before or after the death of the testator, with a declaration, if the legatee die before the legacy is payable, that it shall go to the "survivors," if there be a class, or to some person or person described; then if the legatee should die before the assigned period, although in the lifetime of the testator, the legacy does not lapse, but goes according to the will. If, however, the period should arrive in the lifetime of the testator, and the legatee should survive *it*, and then die before the testator, the legacy does lapse.[3]

We will now proceed to notice the lapse of legacies, payable out of real estate only.

With regard to this class of legacies, the first rule above stated, adopted with respect to legacies payable out of personal estate, viz. that where the *time* is annexed to the *payment* and not to the *gift*, the legacy vests

[1] Patterson v. Ellis, 11 Wend. 259, 268 et seq., per Savage, Ch. J. Burrell v. Shiel, 2 Barb. S. C. R. 470, as to effect of giving interest

[2] Danell v. Molesworth, 2 Vern. 378. Bac. Abr., Leg. E.

[3] Id. Willing v. Baine, 3 P. Wms. 113. Humberstone v. Stanton, 1 Ves. & B. 385, 388.

immediately, though not payable until the time specified arises, does not, generally speaking, prevail.

The reason for the distinction is, that formerly legatory matters were solely cognizable in the ecclesiastical courts, whose decisions were regulated by the civil law; and by that law, a bequest to a person, *to be paid* at a future time, was held to confer a present right to the legacy, notwithstanding the *time* of payment was future. Courts of equity having by degrees acquired jurisdiction of this class of cases, upon the notion of trusts, with a view to a uniformity of decisions, adopted the rule in question, in respect to legacies of personal property. But legacies charged upon real estate, or payable in land, never fell within the cognizance of the ecclesiastical courts. There was not, therefore, the same reason for adopting that rule as applicable to legacies of this description. And as the rule itself was contrary to the favor which the English law shows to the owner of the inheritance, courts of equity rejected it, in respect to all such legacies.[1]

The leading case, in the English books on this subject, was decided in 1683.[2] In that case the father limited a term to trustees for the raising of £4000 apiece for his younger children for their portions, to be paid them at their respective marriages, or ages of one and twenty years, which should first happen; and for paying up to them £100 per annum, maintenance in the mean time; and after these portions and maintenance raised, then the residue of the term was to be in trust for his heir, the defendant. The father, having two daughters by the plaintiff, his second wife, made his will, giving to each of them £4000 apiece for their respective portions, to be raised and paid them in such manner as by the said settlement is directed; but declaring that they should have but the £4000 apiece, and not two, by the settlement and will, unless his son, the defendant, should die without issue, in which case he devised that they should have £2000 apiece more, to be paid in the same manner as the £4000. One of the daughters died, being about eight years of age. The mother took letters of administration to her daughter, and exhibited her bill against the trustees and the heir at law, to have her daughter's portion of £4000 raised and paid. The question was, whether the £4000 portion to the daughter ceased by her death, or should be raised for the benefit of her administratrix. It was admitted by Lord Keeper Guilford, that if the £4000 had been to have been raised out of the personal estate,

[1] Birdsall v. Hewlett, 1 Paige, 32. Harris v. Fly, 7 id. 421, 428. 2 Will. Ex. 780.

[2] Powlet v. Powlet, 1 Vern. 204. 2 Ventris, 366.

it had been clear, the plaintiff must have had it; but being a charge upon the estate of the heirs, he would consider of it; and afterwards he said, that as the portion was to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the will, the claim of the plaintiff could not be supported. In other words, the legacy became lapsed by the death of the legatee, after the death of the testator, but before the time limited for the payment of the legacy.

The doctrine of this case has been followed in numerous English cases,[1] and has been repeatedly recognized in this state.[2] In one of the cases in this state, (Marsh v. Wheeler, supra,) the vice chancellor states the rule, with respect to the vesting of legacies payable out of real estate, thus: where the gift is immediate, but the payment is postponed until the legatee, for instance, attains the age of twnety-one years, or marries, then it is contingent, and will fail if the legatee dies before the time of payment arrives; but when the payment is postponed in regard to the convenience of the person, and the circumstances of the estate charged with the legacy, and not on the account of the age, condition or circumstances of the legatee, in such a case it will be vested and must be paid, although the legatee should die before the time of payment.

The rule, as thus deduced by the vice chancellor, in Marsh v. Wheeler, contains also the exception, and both the rule and exception are adopted by Chancellor Walworth in Harris v. Fly, as they have been in recent English cases.[3] This exception is, that the legacy only lapses in such case, where the payment is postponed by the testator in reference to the situation or circumstances of the legatee personally, and not where it is postponed for the convenience of the estate or fund out of, or in reference to which it was given.[4]

Chancellor Walworth, in Birdsall v. Hewlett, speaking of the rule and exception, says: It is undoubtedly a general rule, that legacies charged upon the real estate, and payable at a future day, are not vested, and become lapsed if the legatee dies before the time of payment arrives. This rule was at first adopted without any exceptions, and in direct opposition to that which existed in relation to legacies payable out of the personal estate. This was done for the benefit of the heir at law, who was a par-

[1] Smith v. Smith, 2 Vern. 92. Reynich v. Martin, 3 Atk. 335. Yates v. Phettiplace, 2 Vern. 416. Duke of Chandos v. Talbot, 2 P. Wms. 610, and cases in note. Prowse v. Abingdon, 1 Atk. 485. Jennings v. Looks, 2 P. Wms. 276

[2] Harris v. Fly, 7 Paige, 428. Birdsall v. Hewlett, 1 id. 32. Marsh v. Wheeler, 2 Edw. 163.

[3] Goulborn v. Brooks, 2 Y. & Col. 539. Murkin v. Philipson, 3 Myl. & K. 261.

[4] See cases above, and Birdsall v. Hewlett, 1 Paige, 32. Harris v. Fly, 7 id. 428. Marsh v. Wheeler, 2 Edw. 163.

ticular favorite of the English courts; and he says, I am not aware that it has ever been extended to a case where the estate was given to a stranger, upon the express condition that he paid the legacy charged thereon; and the rule has long since been much narrowed down, even as between the legatees and the heir at law.

Like the other cases we have considered, a legacy charged on real estate, or payable out of it, with respect to the doctrine of lapse, may be controlled by the clearly-expressed intention of the testator in his will. Thus; in a recent case, the testator gave legacies charged on his real estate to his two daughters, "the same to vest in them immediately on my death, but to be paid on their attaining their ages of twenty-one years, and the interest thereof in the meantime to be applied in their maintenance and education." Both the daughters died infants; and it was insisted that, as against the real estate, the legacies must sink for the benefit of the devisee of the realty. But the vice chancellor, Sir John Leach, held that this was prevented by the express direction that the legacies should vest on the death of the testator; and, therefore, that the personal representatives of the daughters were entitled to the legacies.[1] But for the express direction of the testator, that these legacies should vest, they would have lapsed by the death of the legatees, before attaining the age of twenty-one years.

Having thus noticed the doctrine of lapse in respect of legacies chargeable on real estate, we will notice the same doctrine in reference to legacies chargeable on a mixed fund of real and personal estate.

It has already been shown that, in general, the personal estate is the proper fund for the payment or legacies, although they be charged on the real estate, if the personal estate be not expressly exonerated.[2] On a charge of the legacy on the realty, the latter is merely auxiliary to the personal estate for the payment. It seems to follow, and it has been so adjudged, that so far as the personal estate will go, it is to be applied and to be governed by the same rules we have been considering in relation to legacies payable exclusively from the personal estate; and so far as the real estate must be resorted to for the payment of the legacies, the case follows the same rules as if they were charged exclusively on the realty.

Thus, in a leading case, where the testator bequeathed to his nephew

[1] Watkins v. Cheek, 2 Sim. & S. 199. Hoesen, 1 Comst. 120 Kelsey v. West-
[2] McKay v. Green, 3 J. Ch. R. 56. Lupton v. Lupton, 2 id. 614. Hoes v. Van ern, 2 id. 500.

£500, payable at the age of twenty-five, and devised real estate to trustees charged with the payment of debts and legacies, and the legatee having survived the testator, and died at the age of sixteen, it was held that so much of the legacy as was to affect the real estate, failed by the death of the legatee before he arrived at the age of twenty-five; and that such part of it as the personal estate was sufficient to answer, vested in the legatee, and was transmissible to his personal representatives. In giving his judgment Lord King observed, that there was no difference when the real as well as the personal estate is charged; for in such a case, as far as the executor or administrator claims out of the latter, he shall succeed according to the rules of that court where these things are determinable, even though the infant legatee dies before the time of payment; but, as far as the legacy was charged upon the land, so far should it, on the legatee's dying before the legacy became payable, sink. And this being the rule which had of late universally prevailed, whether the legatee was a child or a stranger, it would be of the most dangerous consequences, and disturb a great deal of property to break into it.[1]

This doctrine is evidently recognized in this state, though the main reason for it is not as strong here as it is in England. The existence of the rule was recognized by the vice chancellor of the first circuit, in the case of Marsh v. Wheeler, already cited. After speaking of the rule with respect to the sinking of legacies charged upon and payable out of real estate, as being different from that where the legacies are payable exclusively out of personal estate, he says: There are cases where it has been held that a legacy, made up partly of personal estate, and partly of money charged upon lands, and to be raised out of the same, has, so far as regarded the personal estate, vested, and lapsed as to the part which was to come out of the realty. But in no case has this been decided where the real estate was ordered to be sold and converted, out and out, into money, and as such, disposed of in legacies. Nor is there any reason for making the distinction, or for applying the doctrine to cases like the present. It can only be where lands are devised or descend to the heir, charged with the payment of a pecuniary legacy to some third person, and payable at a future day, or upon some subsequent event. In such a case, according to the general rule, if the legatee happen to die before the time of payment, the law favors the heir, and considers the legacy lapsed or merged in the inheritance.

In the case in which these remarks were made, the obvious intention of

[1] Duke of Chandos v. Talbot, 2 P. Wms. 601, 613 and note. Prowse v. Abingdon, 1 Atk. 482.

the testator was to convert the whole of his real estate, with the exception of a house and lot devised to his daughters, into money, in order to have the proceeds taken as a part of his personal estate, to have them blended and all disposed of together and as one fund in payment of debts and legacies of five hundred dollars apiece to the daughters, and so as to have the remainder divided between the four sons as residuary legatees. The principle then is, that the intention of the testator, when properly expressed, shall prevail.[1]

SECTION VIII.

OF LEGACIES, ABSOLUTE AND CONDITIONAL.

HAVING treated briefly of *general* and *specific* legacies, and of *vested* and *contingent* legacies, together with the doctrine of lapse, which is an incident to them, we will proceed now, as proposed, to notice legacies *absolute* and *conditional.*

A bequest to a man generally of money or personal property, is an absolute legacy, and, in such a case, a subsequent direction to the executors to put the money at interest for the support of the legatee, does not, in any manner, revoke or qualify the gift. It merely relates to the investment; and being inconsistent with the absolute title before given to the legatee, it is null and void. No valid qualification can be attached to a full title to personal property.[2] So an absolute annuity given by will is not a trust within the Revised Statutes, and is alienable by the annuitant;[3] and is subject to his debts, on a creditor's bill, at the suit of a judgment creditor who has exhausted his remedy at law.[4] Where there is an express limitation of a chattel by words, which, if applied to a will, would create an estate tail, the whole interest vests absolutely in the first taker, and the limitation over is too remote.[5] It is the settled rule, that the same words which, under the English law, would create an estate of freehold, gives the absolute property of a chattel.[6] When an absolute interest is given to the legatee, a devise over is void for repugnancy.[7]

[1] Marsh v. Wheeler, 2 Edw. Ch. R. 157.

[2] Dorland v. Dorland, 2 Barb. S. C. R. 65.

[3] Degraw v. Clason, 11 Paige, 136. Gott v. Cook, 7 id. 521.

[4] Id.

[5] Moffat v. Streng, 10 J. R. 12.

[6] Patterson v. Ellis, 11 Wend. 259 Bradhurst v. Bradhurst, 1 Paige, 331.

[7] 11 Wend. 275, S. C.

As a legacy is absolute, when no condition is annexed to it, it will prevent a repetition of the same cases, to consider the nature and application of conditions, in reference to the testamentary disposition of property. One sort of conditions, namely, that the legatee should be in life, at a particular period, has just been considered. It remains to treat of other conditions, upon which the existence of legacies may depend.

No precise form of words is necessary to create a condition in wills, but whenever the intention of the testator is clearly manifested that the legacy should depend on a condition, and the condition is not repugnant to the estate, or contrary to the rules of law, the intention will be carried into effect.[1]

Conditions are of two kinds; conditions precedent and conditions subsequent. In the former case the legatee has no vested interest in the legacy, until the condition is performed; and in the latter the interest vests, in the first instance, subject to be divested on non-performance or breach of the condition.[2]

If the condition be illegal or repugnant to the estate, it is void, and the legacy is absolute.[3]

An example of a condition precedent will be found in a case before Chancellor Walworth, where the payment of the legacy depended on the reformation of the conduct of the legatee.[4] In that case the testator, by his will, required his executors to pay to his son, the complainant, two hundred dollars a year, and also one-fifth of the testator's estate, in case the legatee should refrain from vicious habits, and conduct himself with sobriety and good morals. About two years after the testator's death, the legatee filed his bill against the executors, insisting that he had reformed, and claiming the payment of his share of the estate. The defendants had refused payment, because they were not satisfied of the complete reformation of the legatee. The chancellor observed, that the intention of the testator would be defeated if the complainant should receive the bequest before he was so far reformed as to render it very certain that he would not return to his former vicious habits. While he justified the executors in withholding the legacy, he declined to dismiss the bill, and referred it to a master to ascertain and report whether there had been such a permanent reformation in the character and habits of the complainant, as to entitle him to receive the whole amount bequeathed to him at that time; and on the coming in and confirmation of the report, if it

[1] Shep. Touch. 433. Pink v. De Thuisey, 2 Mad. R. 157.

[2] Preston's Leg 103, ch. 5.

[3] Bradley v. Peixoto, 3 Ves. 324.

[4] Dustan v. Dustan, 1 Paige, 509.

should appear that such permanent reformation had taken place, that the executors be permitted to pay the whole sum to him, after deducting therefrom their costs to be taxed. And if the parties could not agree upon the amount to which he was entitled, that there be a reference to a master to take an account and ascertain such amount. And if it should appear by the report of the master, on the first reference thereby directed, that such permanent reformation had not taken place, then that the complainant's bill be dismissed with costs.

The decision of the chancellor in the foregoing case, was in conformity to that of Sir William Grant, in a similar case.[1] In the latter case, a legacy was given, provided the legatee changed his course of life; and the master of the rolls held that this was a condition that the court would carry into effect, and he directed the master to inquire, whether the legatee had discontinued to frequent public houses, keeping low company, &c.

In like manner, when the testatrix by her will gave "to the Associate Reformed Church of Broadalbin five hundred dollars, *provided* the Rev. David Caw continued to be their pastor for seven years to come, but if not, then it must be paid over to the said David Caw with interest, was held to be a valid condition precedent; and the pastoral relation between the said Caw and the church having been dissolved by mutual consent, within the seven years, it was further held, that no interest whatever vested in the church, but that Caw was entitled to the legacy.[2]

The word *provided* is one of the appropriate words for creating a condition precedent.[3] So any other words, as "if," "when," &c. may indicate that the legacy will not vest until the condition be performed.

A distinction is taken in regard to bequests on marriage, where it is said if to such marriage consent is required; such consent, unless the legacy be given over, is in general considered *in terrorem* only, and in fact amounts to a nullity.[4] Courts of equity look upon conditions in restraint of marriage with disfavor; if, therefore, the consent be given in *substance* it is sufficient, and the want of circumstances will be supplied. Thus, when an implied assent is given, or a general assent to any marriage the legatee may contract, the legacy is not forfeited.[5] So it will not be forfeited if the person, whose assent is required, encourage the

[1] Tattersall v. Howell, 2 Meriv. 26.

[2] Caw v. Robertson, 1 Seld. 125; S. C., 3 Barb. S. C. R. 410, 418.

[3] Id.

[4] Webb v. Webb, 1 P. Williams, 136. Cleaves v. Spurling, 2 id. 526. Jervois v. Duke, 1 Vern. 20. Atkins v. Hicocks, 1 Atk. 502. 3 Barb. 418, supra.

[5] Bac. Abr., Leg. F.

marriage in the first instance, and afterwards refuse to consent without sufficient cause.[1]

Nevertheless, it is well settled that marriage with consent, whether before or after twenty-one, may be made a condition precedent to a legacy, whether there be a devise over or not,[2] if the intention be otherwise clear.

When the condition of marriage with consent, is a condition subsequent, the legatee will keep her legacy, though she marries without the required consent.[3]

Suppose an executor or trustee, whose consent is required by the will to the marriage of the legatee, refuse to execute his power by consenting, the court will direct one of its masters to inquire into the proposal of marriage, and determine on its propriety; and if the marriage be found suitable, to receive proposals for a settlement on the legatee and issue of the marriage.[4]

There is a distinction between personal legacies and legacies chargeable on land, or devises of land. If the legacy affects land, and there be a condition *precedent*, the estate cannot vest till the condition be strictly performed, whether there be a devise over or not.[5] And if it be *subsequent*, the breach of the condition operates to divest the estate.[6] But in all cases of personal legacies, where there is a devise over, whether the condition be precedent or subsequent, the right of the devisee over will prevail against that of the legatee, if the condition be not performed.[7]

It has been already remarked that marriage ought to be free, and that the law does not countenance such restrictions as unreasonably deter persons from forming that relation. Therefore a devise, upon condition not to marry, or not to marry a person of such a profession or calling, is void, whether there be a limitation over or not. But while the law will annul such conditions as impose an improper restraint upon marriage, it will uphold such as are reasonable and have a tendency to guard the inexperience and ardor of youth from being beguiled by the arts of the subtle and corrupt who would betray them. Hence conditions restraining marriage, as to time, place, or person, have been upheld;[8] as not to marry

[1] Strange v. Smith, Ambl. 263. Mesquett v. Mesquett, 2 Vern. 580.

[2] Aston v. Aston, 2 Vern. 452. Creagh v. Wilson, id. 572. Gillet v. Wray, 1 P. Wms. 284. Elton v. Elton, 3 Atk. 504. Stackpole v. Beaumont, 3 Ves. 89.

[3] Reynish v. Martin, 3 Atk. 332. Burleton v. Humphrey, Ambl. 256. Garret v. Pretty, 2 Vern. 293.

[4] Goldsmid v. Goldsmid, 19 Ves. 368. Clarke v. Parker, id. 18, 19.

[5] Cary v. Bertie, 2 Vern. 333.

[6] Harvey v. Aston, 1 Atk. 381, note.

[7] Id. 1 Fonb. Eq. B. 1, ch. 4, § 10, note 9, where all the cases are collected.

[8] Bac. Abr. tit. Leg. F.

before twenty-one, not to marry at York, not to marry a papist, &c. In one case, a proviso in a will that if the legatee, the testator's daughter, should marry a Scotchman, she should forfeit all benefit under the will, was held good.[1]

The consent to satisfy a condition precedent must, if vested in trustees, be given by all the acting trustees, unless the testator expressly declare that the consent of the majority shall be sufficient. There is no case in which it has been held that the consent of three trustees being required, the consent of two only will be sufficient, when the third has not been consulted. There is a discretion in him as well as in the others; and, therefore, in such a case, the consent of two only, without consulting the third, does not satisfy the requirements of the will.[2]

If consent in writing of the executors be required, and there be two executors, one only of whom executes the will, the consent of the acting executor is deemed sufficient; and even without a writing, it seems his previous approbation of the marriage would be deemed a substantial compliance with the condition.[3] If a legacy vests in the legatee, subject to be divested by marriage without consent of certain persons, and which consent becomes impossible to be obtained, by reason of the death of such persons, the legacy is absolute, and discharged of the condition.[4] This is upon the principle that where a condition subsequent becomes impossible, by the act of God, it is absolutely void.[5]

A marriage in the lifetime of the testator, with his consent or subsequent approbation, is equivalent to a marriage after his death with the requisite consent: as where the testator devises land in trust to permit his daughter to receive the rents and profits until her marriage or death, and in case she marries with the consent of the trustees, then to convey the premises to her and her heirs; but if she married without such consent, then to convey to other persons: the daughter afterwards, and in the lifetime of the father, married with his consent, and he settled part of the land on her and her husband. This settlement was held to be no revocation of the devise, and the consent of the father in his lifetime dispensed with the condition.[6] The same rule applies, though the daugh-

[1] Perrin v. Lyon, 9 East, 170.

[2] Clarke v. Parker, 19 Ves. 17.

[3] Worthington v. Evans, 1 Sim. & Stu. 165.

[4] Peyton v. Berry, 2 P. Wms. 626.

[5] Graydon v. Hicks, 2 Atk. 18. Co. Lit. 206, a. Aislabie v. Rice, 3 Mad. Ch. R. 256. Merrill v. Emery, 10 Pick. 507. The People v. Manning, 8 Cowen, 299. Merrill v. Bell, 6 Sm. & Mar. 730.

[6] Clarke v. Berkley, 2 Vern. 720. Parnell v. Lyon, 1 Ves. & B. 479.

ter marries without consent, if the father afterwards becomes reconciled to the match.[1]

An absolute and unconditional consent once given cannot be retracted, unless some objection occur which ought to have prevented the consent being given at all.[2] And when a settlement on two daughters contained a proviso, that if either married without the consent of her mother, it should be to her separate use; and where the mother proposed the marriage, and afterwards refused consent, the marriage subsequently taking place without consent, was held to be no forfeiture.[3]

It was said by Lord Talbot, that "there are not any technical words to distinguish conditions precedent and subsequent, but the same words may indefinitely make either, according to the intent of the party who creates them."[4] Neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed or the will, for the same words have been construed to operate either the one or the other, according to the nature of the transaction.[5]

For an example of a condition subsequent, may be mentioned a case decided by Sir Wm. Grant, master of the rolls.[6] The testator by his will bequeathed all the residue of his estate to trustees upon trust, to pay to his son the yearly sum of £200, clear of all deductions, during the term of his natural life, or until such time as his said son should actually sign any instrument, whereby or in which he should contract or agree to sell, or otherwise part with the same or any part thereof, or in any way charge the same or any part thereof as a security for any sum or sums of money to be advanced or lent to him by any person or persons whomsoever, or in any other manner whatever charge or dispose of such annuity or any part thereof by anticipation, or whereby or in which he should authorize or empower, or intend to authorize or empower any person or persons whomsoever to recover such annuity, or any part thereof, except such only as the then next quarterly payment, after such authority or power should be given; and he declared his will to be, that in case his said son should, at any time, sign or execute any such instrument or writing for the purpose, or for any of the purposes aforesaid, (except as aforesaid,) then and from thenceforth the same and every part thereof

[1] Wheeler v. Warner, 1 Sim. & Stu. 304. Smith v. Cawdry, 2 id. 358.

[2] Dashwood v. Bulkeley, 10 Ves. 242. 2 Ves. & B. 234.

[3] Strange v. Smith, Ambl. 263.

[4] Robinson v. Comyns, Cas. temp. Talb. 166.

[5] Hotham v. East In. Co. 1 D. & E. 645 per Ashurst, J.

[6] Shee v. Hale, 13 Ves. 404.

should cease to be paid or payable to him, and should sink into the general residue of the testator's personal estate. The legatee, after the death of the testator, being in confinement for debt, took the benefit of the insolvent act, and the annuity mentioned in his father's will was inserted in the schedule of his property delivered in and signed by him. On a bill filed by the assignees under the insolvent act, claiming the annuity, it was held that the legacy was forfeited, and sunk into the residue of the testator's estate.

So also where the testator bequeathed the surplus of his personal estate to his niece, about the age of seventeen, to be paid to her at the age of twenty-one years, and if she should die before twenty-one or marriage, then over; it was held that the surplus vested in the niece, and that the bequest over was upon a condition subsequent.[1]

In case a condition precedent be impossible to perform, a different rule prevails in respect of legacies of personal property, from that which obtains in relation to devises of the realty. In the latter case, if the condition be impossible no estate vests, and the devise is void.[2] In the former, as the rules of the civil law prevail, the bequest is single, that is, discharged of the condition.[3]

Where a condition subsequent is impossible, or becomes impossible by the act of God, the condition will be void, and the legacy single and absolute; and in this case, the civil and common law coincide.[4]

If a condition precedent be illegal, by reason of its requiring the performance of an act that is *malum in se*, as to kill J. S., or to burn a house or the like, not only the condition but the entire legacy is void, as well by the common as the civil law.[5]

But if the condition precedent merely requires the performance of some act that is not *malum in se* but *contra bonos mores*, though by the common law both the legacy and condition are void, yet by the civil law, which is followed by the ecclesiastical courts and courts of equity, the legacy is good, and the condition only is void. The legatee, therefore, takes the legacy, as if no condition was annexed. Thus, a bequest to a *feme covert*, on condition she lived apart from her husband, was held by Lord Northington to be single and pure, and the condition only to be void as *contra bonos mores*.[6]

[1] Nicholls v. Osborn, 2 P. Wms. 419.

[2] Co. Litt. 206, b.

[3] Swinburne, pt. 4, § 6, pl. 2, 3.

[4] Aislabie v. Rice, 3 Mad. Ch. R. 256. Co. Litt. 206, a, b. Lowther v. Cavendish, Ambl. 358. Thomas v. Howell, 1 Salk. 170.

[5] Co. Litt. 206, b.

[6] Brown v. Peck, 1 Eden, 140. Cooper v. Remsen, 5 J. Ch. R. 463.

This matter received the consideration of Chancellor Kent in a case which came several times before him, and in which he seems to have recognized the foregoing distinctions.[1] In that case the will contained the following clause: "I give and devise to my daughter Eliza Cooper, her heirs and assigns forever, all the furniture which she has received from me, amounting to $3570.23, and which now stands in my books against her, and in full satisfaction of all further provisions out of my estate. I do give and bequeath to her, during her separation from William Cooper, her present husband, $1000 a year, *which sum is hereby charged upon my real estate*, and shall be paid by the other children, in proportion to their income arising out of their portions of the real estate; and I do hereby declare it to be my intention, that neither my said daughter Eliza Cooper, nor any of her children, by the said William Cooper, shall inherit any part or portion of the real estate hereafter devised, or the rents, issues or profits thereof, as heirs, or heirs to any of my other children, nor shall she, nor any of her said children, be considered or adjudged as the legal representative or representatives of any of my other children, so as to be entitled to recover any portion of my real or personal estate, except that which I have hereby expressly given to her." At the date of the will and before that time the legatee and her husband, W. C., lived separate and apart, and she then resided with her father. This separation continued eight or ten months, when they again lived and cohabited together. The bill further stated that a disagreement existed between the plaintiff's husband and her father, at the time the will was made, and which continued to his death; that shortly after her father's death, she was constrained by her husband to live separate and apart from him, and so continued to live separate for more than a year; that the separation was not induced by any desire on the part of the plaintiff to obtain the legacy given to her by her father's will; and she was, at the time of the separation, ignorant of the contents of the will; that the separation was compulsory and against the will of the plaintiff; that the real estate was more than sufficient to pay all the debts, and the legacy, &c.; that her husband, W. C., was unable to maintain her, and died intestate after the will took effect, and his property was not sufficient to pay his debts; that she had three children by W. C. who are infants and without means of support; that she had offered security to refund in case of a deficiency of assets; that her sisters J. and E. had satisfied her as to that part of the legacy chargeable on their portion of the real estate. She prayed that the defendants, the executors, might be decreed to pay to her the

[1] Cooper v. Remsen, 3 J. Ch. R. 382, 522; S. C., 5 id. 463.

arrears of the annuity given her by her father's will, with interest, and for general relief.

The answer admitted most of the facts charged in the bill: that the plaintiff and her husband lived apart when the testator made his will, but were living together when the codicil was made, which fact was known to the testator. It was proved that about three months after the death of the testator the plaintiff and her husband separated, and continued to live separate for a year. The chancellor held that the legacy, depending on a separation which existed at the time of the execution of the will, between the legatee and her husband, and with a view to that fact, the condition annexed was lawful and proper; and the separation having ceased, when the will took effect by the death of the testator, there was an end of the legacy; and a voluntary separation of the plaintiff and her husband, after the death of the testator, would not entitle her to it.

As the legacy in this case was charged on the real estate of the testator, and was to be paid by the other children of the testator, in proportion to their incomes arising out of their portions of the real estate, it was governed according to the rules already considered by the common law, and not by the principles of the ecclesiastical law. The remarks of the chancellor, in every stage of the cause, must be understood with reference to this fact, whether it was distinctly stated by him or not. If, says the chancellor, the testator had made the will in reference to a separation to take place *after his death*, it would have been contrary to good morals and good policy, because it would be holding out a temptation to the parties to separate, by private agreement, for the very purpose of acquiring the annuity. And it would be extremely dangerous to allow the wife to set up a separation, subsequent to her father's death, and to claim a benefit from it. Such a claim is liable to great abuse, and ought to be viewed with extreme suspicion.

These observations are unquestionably sound, with reference to a legacy governed by the rules of the common law, as in the one under his consideration. By that law the legacy and the condition are both void, if the condition require the performance of an act against sound morals and public policy, though the act be not *malum in se*. But according to the ecclesiastical law, which prevails in respect of *personal legacies*, as has been shown, the condition only is void, and the legacy is single, freed from the condition. This is illustrated by the case of Brown v. Peck, already cited, and which is quoted without dissent by the chancellor in Cooper v. Remsen.[1] In that case the testator bequeathed to his

[1] 5 J. Ch. R. 462.

niece £2 a month, if she lived with her husband, and £5 a month, *if she lived from him;* and Lord Northington was of opinion that she was entitled to the £5 a month payment; for the condition being *contra bonos mores*, the bequest was single.

Where a man devised, after debts and legacies paid, the surplus of his estate to his wife and his son John, equally between them, and adds, *whom I make my executors*, and further wills that she should continue his true widow; but if she marry again, *my will is, she shall render the right of being my executrix to my son Roger, to be partner with his brother John in the executorship*, it was held that by the wife's marrying again, she had as well lost her share of the surplus, as her right to the executorship.[1]

In Richards v. Baker,[2] the testator bequeathed to his wife his goods, furniture, &c. in or belonging to his house, "so long as she continued his widow, and no longer," and he disposed of his residuary estate, but gave no directions as to what was to become of the property bequeathed to his wife in the event of her second marriage, Lord Hardwicke decided, that she was entitled to them only during her widowhood. But in a later case before Sir Thomas Plumer, M. R., the testator bequeathed to his wife, "should she survive and continue a widow," all his personal estate for life, and he disposed of it after her decease: the widow married again, and the property for the remainder of her life was claimed by the testator's next of kin, yet the court decided against such claim, holding that it was a condition *in terrorem* merely, and that the widow was entitled to the property for life notwithstanding a breach of it.[3] This latter case is pronounced by an eminent writer, of doubtful authority.[4]

A devise by husband to his wife, or a personal legacy charged upon land during her widowhood, is, in either case, valid.[5] In Lasher v. Lasher,[6] the testator directed that his wife should be well and sufficiently supported and maintained by one of his sons, out of property bequeathed to him, *so long as she remained his widow.* The will gave to the said son in fee a farm of one hundred acres, and the half of a wood lot, being fifteen acres. The validity of the legacy to the wife was not called in question by counsel, and was assumed by the court to be valid, and the case was decided in favor of the widow in an action to recover for the

[1] Barton v. Barton, 2 Vern. 308.

[2] 2 Atk. 321. Lucas v. Evans, 3 id. 260. Harvey v. Aston, 1 id. 379.

[3] Marples v. Bainbridge, 1 Mad. Ch. R. 590.

[4] 2 Will. Ex 792.

[5] Cruise's Dig. by Greenleaf, tit. Condition, §§ 66, 67. Fitchet v. Adams, 2 Str. 1128. Jordan v. Holkham, Ambl. 209.

[6] 13 Barb. 106.

expense of her support and maintenance. It is true that the son, having accepted the estate charged with the support of his mother, could not call in question the restriction on the legacy, as it was in his favor.

The general understanding of the profession in New-York is, that either a personal legacy, whether charged on real estate or not, or a devise *by husband to his wife* during widowhood, or until she marries again, whether there be a devise over in case of marriage or not, is valid, and that the restriction, whether it be a limitation or condition, is good; and that the legacy terminates, or, if vested, becomes divested, on the re-marriage of the legatee.[1]

But a legacy *by a stranger*, that is, by a *person other than the husband*, to a widow upon condition that it shall become void upon her re-marriage, is void, for there is no reason why a person who does not stand in relation of husband to the legatee, should impose a restraint upon a widow from marrying, any more than upon a maid.[2]

A majority of the supreme court of Massachusetts, in one case, decided that a legacy by the husband to his wife "during her widowhood and life," was designed by the testator to terminate on the subsequent marriage of her; and that had it been a condition precedent, the legacy could not have vested without showing performance. But being a condition subsequent, and no limitation over, it was considered merely *in terrorem* and the condition void as in restraint of marriage, and that she held it notwithstanding her re-marriage.[3] The case in Burrows' Reports,[4] on which this decision rests, does not fully sustain the doctrine of the court in Massachusetts. In Long v. Dennis the devise was not by the husband to his wife, which it has been seen stands upon its own peculiar ground, but it was a provision in the will of the father, for his son, and for the widow of the son, to be void in case he married with any woman not having a competent portion, *or* without the consent of the trustees, &c.; and the only point decided was, that the condition was performed so as to vest the estate in the husband, if one alternative, viz. marrying a woman with a competent marriage portion, was complied with. It did not raise the question of a legacy during widowhood. Lord Mansfield,

[1] In the following cases "a legacy during widowhood" was contained in the will, and not made a matter of objection. Williamson v. Williamson, 6 Paige, 298. Hoes v. Van Hoesen, 1 Barb. Ch. R. 379; S. C. on appeal, 1 Comst. 120. Sweet v. Chase, 2 id. 73, 80. Edwards v. Bishop, 4 id. 61. Lasher v. Lasher, 13 Barb. 106. Judge Story lays it down that a legacy on such a condition is valid. Story's Eq. Juris. § 285.

[2] Godol. Orph. Leg. 45, 46. Bac. Abr. tit. Leg. F.

[3] Parsons v. Winslow, 6 Mass. 169, 178.

[4] Long v. Dennis, 4 Burr. 2055.

indeed, speaks of conditions in restraint of marriage as odious, and that they should be held to the utmost rigor and strictness; as being contrary to sound policy.[1] But his remarks were not applicable to conditions imposed by a husband, restraining his widow from a second marriage.

An attempt has been made to draw a distinction between an estate *limited* to a widow, so long as she remains unmarried, which is admitted to be good, and an estate upon condition subsequent, to the like effect, which it is insisted is void.[2] We are not aware that the distinction has ever been recognized by the New-York cases, and it is difficult to perceive how, if the first can be upheld, as it doubtless can be, the other should be rejected.[3]

If a legacy be given upon the performance of a condition subsequent which is illegal, the rule at common law and by the civil law, adopted in courts of equity, is the same, and the condition is void, and the legacy is absolute, freed from the condition, and is as if no condition had been annexed to it.[4]

It is upon this principle that conditions and qualifications inconsistent with, and repugnant to the gift, are wholly void, and are to be rejected. This rule is well illustrated by a case decided by Lord Alvanley, master of the rolls. The case was this: the testator, among other things, bequeathed to his son the dividends arising from £1620 of bank stock, for his support, during his natural life; but at his decease the said stock, principal and interest, were given to his heirs, executors, administrators and assigns; but if he attempted to dispose of all or any part of the said bank stock, such attempt should exclude him from any benefit of the will, and should be a forfeiture, and the fund go to the testator's other children. The bill was filed by the legatee to compel the administrator with the will annexed to transfer the said stock to the legatee, and the court held that the condition annexed to the legacy was repugnant to and inconsistent with the interest given to the legatee in the stock, and therefore void; and he directed the stock to be transferred accordingly. In disposing of the case the master of the rolls said: I find it laid down as a rule long ago established, that where there is a gift with a condition

[1] Lord Eldon questions the authority of Long v. Dennis, in Clarke v. Parker, 19 Ves. 19, 20.

[2] Middleton v. Rice, 1 Penn. Law Journal, 229, N. S. Bennett v. Robinson, 10 Watts, 348. Cruise's Dig. vol. 2, tit. 13, ch. 1, § 66 note.

[3] A testamentary provision in the will of a father for the support of a daughter, until her marriage, is, in general, the dictate of humanity and paternal love, and is believed to be unobjectionable

[4] Co. Litt. 206, a, b. Poor v. Mial, 6 Mad. R. 32.

inconsistent with and repugnant to such gift, the condition is wholly void A condition that tenant in fee shall not alien is repugnant, and there are many other cases of the same sort. In all these cases the gift stands, and the condition or exception is rejected.[1]

With regard to the performance of conditions, there is a difference between such as are precedent and such as are subsequent. The general rule, in regard to conditions precedent, is, that they must be strictly performed. Nevertheless, by the civil law, which in this respect is adopted by courts of equity, if the condition is performed *cy pres*, as it is termed, that is, so as in *substance* to fulfill the intention of the testator, it is sufficient.[2] Swinburne gives an example of the doctrine of the civil law, thus:[3] "If A. bequeath a legacy to B. in case he erect a monument to A. *within three days* after A.'s death; although B. should not literally comply with the condition, he would be entitled to the legacy upon building the monument within a reasonable time, since the *erection* would be considered the motive and essence of the bequest, and the *time* appointed for the building but a mean to expedite the business." On the same principle, where a legatee was required to execute a release within a certain time, it has been held, when there was an adequate reason for not executing it within the time specified, if it was in truth executed within a reasonable time, it was a substantial compliance with the direction of the will. The main object of the will was to obtain the *release*, and the time within which it was to be executed was merely subsidiary to the main object.[4]

The observance of time may however become an important element in the title to the legacy, where there is a limitation over, upon the non-performance of the first legatee.[5] Thus, where the testator, reciting in his will the probability that the legatee was not living, bequeathed to him a sum of money upon the express condition that he should return to England and personally claim the same of the executrix, or in the church porch; and if he should not so claim within seven years, to be presumed dead, and the legacy to fall into the residue. The legatee not having returned, and dying abroad within the seven years, the legacy was held not to be due.[6]

With respect to conditions subsequent, the general rule is, that they are to be construed with great strictness, since they go to divest an estate

[1] Bradley v. Peixoto, 3 Ves. 324. Schermerhorn v. Negus, 1 Denio, 448.

[2] Swinburne, pt. 4, § 7, pl. 4.

[3] Id. § 6, pl. 11.

[4] Simpson v. Vickers, 14 Ves. 341.

[5] Id.

[6] Tulk v. Howlditch, 1 Ves. & B. 248 Burgess v. Robinson, 1 Mad. R. 172

which has been already vested. Conditions which destroy an estate are taken strictly, and a forfeiture should not prevail upon doubtful constructions of evidence.[1]

Where a condition which is to divest an estate becomes impossible by the act of God, the condition is discharged. Thus, if a devise be to A. for eight years, remainder to B. in fee upon condition that he settles and resides on the land, and B. dies during the eight years, his heirs take his vested remainder.[2]

To this head of conditional legacies belong legacies to executors, *in their character of executors*. In such case it is well settled that to entitle the legatee to his legacy, he must take upon himself the duty of the office, with a bona fide intention to execute the trusts which the office imposes.

A legacy may be given to a person named as executor, as a mark of the testator's regard, and independently of the office of executor. In such a case the assumption of the office is not necessary to entitle the legatee to the bequest. The two questions which usually arise in this class of cases, are, 1st, where a legacy shall be said to be given to a man *in his character of executor;* 2d, and what shall be a sufficient assumption of the office to entitle the legatee to a legacy so given.

(1.) The prima facie presumption is, that a legacy to a person appointed executor is given to him in that character; and the burden is cast upon him to show, from the whole scope of the will, that the gift was intended for the person, as a friend or a relative, rather than as annexed to the office.[3] As was said by the master of the rolls on one occasion, nothing is so clear, that if a legacy is given to a man *as executor*, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor.[4]

The presumption will be rebutted if it shall appear, from the whole will, that the legacy is bequeathed to the legatee in his personal character, independently of his representative character as executor. This is exemplified by an early case, where the testator, as an encouragement to his executors, who were four in number, to accept of the trust and executorship, gave to each of them £100 and £12 apiece for mourning, and to each of them a ring, and £10 a year for their trouble. Lord Chancellor Cowper said, that notwithstanding the condition of the acceptance

[1] Hogeboom v. Hall, 24 Wend. 146.

[2] McLachlar v. McLachlan, 9 Paige, 534.

[3] Stackpole v. Howell, 13 Ves. 418. Dix v. Reed, 1 Sim. & Stu. 237.

[4] Harrison v. Rowley, 4 Ves. 216.

might seem to run to all the legacies, yet the executors, though they did not act, should have their rings and mourning, these being intended them immediately, and not to wait their time of acceptance; but that they should not have their £100 and an annuity of £10 each, unless they accepted of the trust.[1]

(2.) With regard to what will be a sufficient assumption of the character of executor to entitle the legatee to a legacy, bequeathed to him in the character of executor, the proving of the will, with the intention to act under it in the executorship, is undoubtedly a performance of the condition.[2]

Under the New-York Revised Statutes, probate of a will cannot be granted without a citation to the widow and next of kin of the deceased, nor can letters testamentary be granted until thirty days after probate, if an affidavit shall be made and filed with the surrogate by the widow, next of kin, legatee or creditor, setting forth that such persons intend to file objections against granting such letters, and stating therein their belief that valid objections exist to the granting of such letters.[3] Should the executor survive the testator, but die before letters testamentary were issued, it would seem that his representatives would be entitled to the legacy, if he had in good faith commenced proceedings for obtaining letters testamentary on the will, or joined in such proceedings by his associates.[4] Whether the death of the executor after the testator, and without the knowledge on the part of the executor that he was named as such in the will, would occasion a lapse of the legacy, has not perhaps been decided.[5] In such a case, the failure to comply with the condition is not occasioned by any intention not to accept the legacy and the executorship, but is occasioned by the act of God. There is certainly no *renunciation* of the office, and no neglect or backwardness in accepting. It would seem, on principle, that the legacy would in such a case go to the representatives of the legatee.[6]

A legacy given to an executor for care and pains is not to be regarded in the light of a debt, or as founded on contract, nor to be governed by the principles applicable to contracts. Such a legacy, on a failure of assets to pay debts and legacies, must abate like other legacies, which it would not do if it were merely a debt.[7]

While, in general, it is the duty of a person to whom a legacy is be-

[1] Humberston v. Humberston, 1 P. Wms. 333. Dix v. Reed, 1 Sim. & Stu. 237. Corkerell v. Barber, 2 Russ. Ch. C. 585.

[2] Harrison v. Rowley, 4 Ves. 212.

[3] L. of 1837, pp. 524, 528, §§ 7, 22.

[4] Harrison v. Rowley, 4 Ves. 212.

[5] Id. 215.

[6] Brydges v. Wotton, 1 Ves. & B. 134.

[7] Morris v. Kent, 2 Edw. Ch. R. 175, 179. Fretwell v. Stacy, 2 Vern. 434. Att'y Gen. v. Robbins, 2 P. Wms. 25.

queathed for care and pains, to act promptly, and while any unnecessary delay of the legatee in accepting the trust, may be laid hold of by the court to deprive him wholly of the legacy, yet it seems, if the legatee finally accepts, he may be allowed such portion of the legacy as his services bear to the whole duty imposed upon him by the will, as the inducement for giving the legacy.[1] Thus, in the case of Morris v. Kent, just cited, the testator by his will appointed his widow and the defendant executors of his will; and accompanied the appointment of the defendant with a bequest in these words: "hereby giving my said executor $10,000 for his care and trouble in executing that office." The widow proved the will, and the defendant Kent being apprehensive that there would not be enough of the estate left, after paying the debts, to satisfy his legacy or to compensate him for the care and trouble which would attend the discharge of his duties, hesitated about taking upon himself the office of executor; and at one period actually resolved not to undertake the trust, and he so informed the widow. In consequence of his not taking upon himself the trust, with the widow, the latter was under the necessity of appointing an agent to attend the affairs of the estate; and for this purpose she employed a professional gentleman, who continued in such agency about a year, and to whom she allowed the sum of $4000. Subsequently the defendant, at the earnest request of the executrix, qualified as executor and took upon himself the active duties, and continued to discharge them down to the filing of the bill, having received and disbursed large sums of money on account of the estate. The balance in his hands he claimed to apply towards the payment of the legacy of $10,000. The bill was filed for an account, and the complainants insisted that the defendant was entitled to *no* part of the legacy, while he claimed the whole of it.

The vice chancellor said that the legacy in this case was given to the defendant in his character of executor; it being expressly intended as a satisfaction for his care and trouble in executing the office. It is therefore a conditional legacy; and, according to the well established rule in such cases, the defendant would not be entitled to claim payment without clothing himself with the character of executor, or, in other words, without accepting the office and undertaking to discharge its duties. This the defendant has done; but not without hesitation: besides the delay of more than a year, and even a refusal at one period to qualify. Such refusal, however, was not an absolute renunciation. He was still at liberty to qualify.

[1] Morris v. Kent 2 Edw. Ch. R. 174.

The question then became one as to what, if any, deduction should be made from the legacy.

The vice chancellor upon this point said, that it must be admitted that where a specific sum is proposed as a compensation for an entire service and only a part is performed, it is but reasonable and just the reward should be proportioned to the extent of the service done. He admitted that this principle of natural justice and equity is, in general, confined to matters of contract, and does not apply as between the testator and his executors in relation to a legacy for care and trouble, because such legacy is not a matter of convention or agreement, but proceeds from the mere bounty of the testator, like any other legacy; that the executor is under no legal obligation to accept the office; he enters into no stipulation or agreement with his testator to this effect, and may decline it if he chooses; and as the legacy is given to him in this capacity, or is expressed to be for his care and trouble in executing the office, the law interposes no further than to attach to the gift an implied condition of his accepting the office, so that if the executor substantially complies with the condition, he becomes entitled to the bounty of the testator, and then there is to be no apportionment according to the degree of care and trouble, or value and extent of the services performed.

But while these things are so, and in none of the cases has an abatement or apportionment, according to the services rendered, been made a question, still no case has denied the right of the court, in a proper case, to interfere with the amount of a legacy, in a special case of that sort; and he thought the present called for such interference. And he accordingly held, that the defendant's legacy should be liable to a deduction by reason of the necessity to which his refusal, in the first instance, subjected the executrix of employing an agent, and of the expense such agency occasioned.

Though the case of Morris v. Kent (supra) is without precedent, it was nevertheless decided upon sound principles of natural justice and equity. There could be no doubt that the legacy was intended as a compensation for the care and pains of the legatee, in the trust confided to him. It would be a fraud upon the bounty of the testator, to permit the executor to receive the whole legacy, unless he performed the whole service, or was defeated in the performance of it by death after he had entered upon it. And it would be just to both parties, if the legatee performed a substantial part of the service, that he should receive such portion of the intended recompense, as the service actually performed bore to the whole service to be performed at the death of the testator.

Though, in general, the obtaining probate of the will is a sufficient

compliance with the condition to entitle an executor, to whom a legacy is given in that character, to hold the said legacy, yet if it be made to appear that this act of obtaining probate was merely colorable and with no intention of performing the trust, but merely to get the legacy, a court of equity will not aid the legatee in obtaining it. Thus, where the testator appointed four executors, and gave to each who should prove his will, and act in the execution of it, a legacy of £1500 and an annuity of £100. All the executors proved the will, and soon afterwards a bill was filed to carry the trusts into execution. After this, one of the executors ran away with the testator's infant daughter, and went through a ceremony of marriage with her abroad, which was afterwards annulled by the spiritual courts: Lord Thurlow held that the executor's concurrence in the probate, under those circumstances, did not entitle him to the legacy or the annuity, for the facts showed that he had no real intention of acting under the will.[1]

SECTION IX.

OF CUMULATIVE LEGACIES.

THERE is a distinction in the cases between a *repetition* of a prior bequest to the same legatee in the same will or codicil, and an additional bounty given to one to whom in the same will, or in another will or codicil, a legacy has been bequeathed. In the former case, the legatee takes only one of them; in the latter, the legacies are treated as cumulative, and the legatee takes the whole. Thus, a bequest of two annuities of equal amount in the same will to the same person, was held to be a repetition, and not accumulative.[2] It depends essentially on the intention of the testator, to be collected from the whole will, whether the legacy shall be treated as a repetition, or as cumulative. In an early case in this state, Kent, chief justice, after a review of numerous cases, stated the general rule on this subject to be,[3] that where the sum is repeated, *in the same writing*, the legatee can take only one of the sums bequeathed. The latter sum is held to be a substitution, and the bequests are not taken cumulatively, unless there be some evident intention that they should be so considered, and it lies with the legatee to show that intention, and rebut the

[1] Harford v. Browning, 1 Cox, 302.
[2] Holford v. Wood, 4 Ves. 76.
[3] De Witt v. Yates, 10 J. R. 158.

contrary presumption. But where the two bequests are in *different instruments*, as by will in the one case, and by a codicil in the other, the presumption is in favor of the legatee, and the burden of contesting that presumption is cast upon the executor. The presumption either way, whether against the cumulation, because the legacy is repeated in the same instrument, or whether in favor of it, because the legacy is by different instruments, is liable to be controlled or repelled by internal evidence, and the circumstances of the case.[1] This question, which appears to have arisen so often, and to have been so learnedly and ably discussed in the English courts, was equally familiar to the civil law. The same rule existed there and was subject to the same control. (Dig. 30. 1. 34; Dig. 23. 3. 12.) The civil law puts the case altogether upon the point of the testator's intention; but then, if the legacy was repeated in the same instrument, it required the highest and strongest proof to accumulate it. *Evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse.*

When there is no internal evidence of the intention of the testator, the following positions of law appear to be established by the cases to which reference has been made.

1. If the *same specific thing* is bequeathed twice to the same legatee in the same will, or in the will and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once.[2] 2. Where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the *same instrument*, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only. 3. Where two legacies of quantity of unequal amount are given to the same person in the *same instrument*, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both. 4. Lastly, where two legacies are given *simpliciter*, to the same legatee by different instruments, in that case also the latter shall be cumulative, whether its amount be equal or unequal to the former.[3]

[1] Godol. Orph. Leg. pt. 3, ch. 26, § 46. Swinb. pt. 7, ch. 21, § 13. The Duke of St. Albans v. Beauclerck, 2 Atk. 636. Garth v. Meyrick, 1 Bro. 30. Bridges v. Morrison, id. 389. Hooley v. Hatton, id. 390, n. Wallop v. Hewett, 2 Ch. R. 37. Newport v. Kinaston, id. 58. James v. Semmens, 2 H. Bl. 214. Allen v. Cullen, 8 Ves. jr. 289. Barclay v. Wainewright, id. 462. Osborne v. The Duke of Leeds, 5 Ves. 369.

[2] 2 Will. Ex. 800. Toller, 335.

[3] See cases under preceding note, and Benyon v. Benyon, 17 Ves. 34. Balie v. Butterfield, 1 Cox, 392. The Duke of St. Albans v. Beauclerck, 2 Atk. 636, 638 et seq. where the whole doctrine is explained fully.

But in many cases there is *internal* evidence of the intention of the testator, that the one legacy is a mere substitution for the other. In such cases the intention must prevail.

On the other hand, the general inference that legacies are cumulative, arising from the fact of their being for an unequal amount, or given by different instruments, or where different reasons are assigned for the testator's bounty, may be strengthened by internal evidence; as where the legacies are of different kinds, or payable at different times, or belong to different classes, as that one is vested and the other contingent.[1]

In De Witt v. Yates, (supra,) the only circumstance to show that the testator intended the second legacy to be cumulative was, that the latter was charged upon a person in respect of real estate devised to him. But this, the court thought, afforded no intention to accumulate. The inference is the other way. It was only strengthening the security of the legacy by means of the charge.

In the cases we have considered, the question has been, in general, whether the intention is sufficiently manifested by the instrument by which the legacy is given, to enable the court to determine whether the legacy is a mere repetition, or was intended to be cumulative. It may be proper, in conclusion, to say, that parol evidence is inadmissible to show the intent of the testator, whether the testator intended by the legacy to confer a double benefit or not. Although there are some dicta to the contrary, yet the subject was put at rest by the vice chancellor, in a well considered opinion. "Our primary principle," says Sir John Leach, V. Ch.,[2] "is, that evidence is not admissible to contradict a written instrument. In some cases courts of equity raise a presumption against the apparent intention of a testamentary instrument, and then they will receive evidence to repel that presumption; for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed.

"Thus, where the court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him, and to repel the presumption that a portion is satisfied by a legacy. In all these cases the

[1] Masters v. Masters, 1 P. Wms. 424. Russ. Ch. C. 257. Mackenzie v. Mackenzie, id. 262. Currie v. Pye, 17 Ves. 462. Hodges v. Peacock 3 id. 735. Wray v. Field, 2

[2] Hurst v. Beach, 5 Mad. 351, 359.

evidence is received in support of the apparent effect of the instrument, and not against it.

"Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of £300 to the defendant, and makes to him a further substantive gift of £500. The evidence tendered is, that the testatrix did not mean this as a further gift of £500, but meant to substitute the £500 in the place of the former £300.

"I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument."[1]

SECTION X.

OF SATISFACTION.

IN administering the law in relation to legacies, courts of equity are frequently called upon to determine whether the legacy be intended as a bounty, or a payment of a debt due by the testator to the legatee. It is an established rule in courts of equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the debt due, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt.[2] Thus, where W. was indebted to the testatrix on bond and mortgage $4000, and the testatrix owed him on account less than $2400, and she declared by her will, that on W.'s paying $1600 the bond and mortgage should be discharged, which was done accordingly, and it appeared by conversations between W. and the testatrix, that she intended the bequest should go to discharge the debt due to him, it was held that the legacy operated as payment, and would be so treated in a court of law, in an action by W. brought against the executors to recover the debt. The parol evidence in this case did not tend to vary or contradict any provisions of the will. It went to explanations independent of the will, respecting a state of facts about which it was silent. It was therefore admissible.[3]

The presumption of satisfaction will not arise where the debt was not

[1] Lee v. Paine, 4 Hare, 201, where the doctrine of cumulative legacies is fully treated.

[2] Fowler v. Fowler, 3 P. Wms. 353. Williams v. Crary, 8 Cowen, 246.

[3] Id.

contracted till after the making of the will.[1] Nor will it be treated as payment *pro tanto*, if it be less in amount than the debt; nor if the legacy be upon condition, or be contingent and uncertain.[2]

A legacy, to be a satisfaction of a debt, must be given by the same person by whom the debt is due;[3] and generally, and not for any particular or specified cause; it must be of the same nature, equal or greater in amount, equally beneficial in point of continuance and commencement, and payable at a period as advantageous to the legatee as the debt.[4]

The presumption that the legacy was intended as a satisfaction of the debt, may be rebutted by other circumstances in the will: thus, where a different purpose is expressed by the testator as the motive of the gift, or where there is an express direction in the will for the payment of all *debts and legacies*.[5]

It is said that a legacy shall in all cases be construed as a satisfaction, in case there is a deficiency of assets.[6]

It has thus been shown that a legacy may, under certain circumstances, be a satisfaction of a debt. It may be proper to add, that a legacy may be satisfied by an advancement of the testator, in his lifetime, either on the marriage or subsequent to the marriage of a legitimate child. The question of satisfaction generally comes before the court upon two occasions; 1st, where a portion or provision is secured to a child by marriage settlement or otherwise, and the parent or person *in loco parentis* afterwards by will gives the same child a legacy, without expressly directing it to be in satisfaction of the portion; and 2d, where a parent or person *in loco parentis* by will bequeaths a legacy to a child or grandchild, and afterwards gives a portion to or makes a provision for that child or grandchild *in his lifetime*, without expressing it to be in lieu of the legacy; (for it seems that an express declaration, or perhaps evidence of the intent, will in either case repel the general presumption.) With respect to the *first* point, the general rule is, if the latter provision be as great as, or greater than, the former portion or provision, then it is a complete satisfaction; if not so great, then a satisfaction *pro tanto*. But this rule only applies where the *subsequent* legacy or provision is attended with the same degree of certainty as the former portion. In regard to the *second* point, the rule seems to be, that where a legacy is given to a child

[1] Jeffs v. Wood, 2 P. Wms. 132. Thomas v. Bennett, id. 343.

[2] Cranmer's case, 2 Salk. 508. Nicholls v. Judson, 2 Atk. 300.

[3] Crompton v. Sale, 2 P. Wms. 555.

[4] Eastwood v. Vincke, 2 P. Wms. 616. Lee v. Brown, 4 Ves. 362.

[5] Chancey's case, 1 P. Wms. 409. Richardson v. Greese, 3 Atk. 65.

[6] Toller, 337. 2 Will. Ex. 808.

who afterwards, upon marriage or otherwise, receives from the testator in his lifetime the like or a greater sum, that sum shall be deemed a satisfaction of the legacy.[1]

A bequest by the testator to his debtor, of a debt, is merely a release of the debt by will, and operates only as a legacy; and is assets therefore, subject to the payment of the testator's debts.[2] If the testator in his lifetime receive the debt, it is an ademption of the legacy.[3]

Formerly the nomination of the debtor of the testator as executor, operated as a release or extinguishment of the debt.[4] But this rule is now abrogated by the Revised Statutes, and the debt is required to be included among the credits and effects of the deceased, in the inventory, and the executor is liable for the same, as for so much money in his hands, at the time such debt or demand becomes due; and he is required to apply and distribute the same in the payment of debts and legacies, and amongst the next of kin, as part of the personal estate of the deceased.[5]

SECTION XI.

OF ELECTION.

THE limits of this treatise will not permit a full discussion of the doctrine of election, and nothing further will be attempted than to give some of the leading principles which have been adjudged by the courts on this subject.

The jurisdiction exercised by courts of equity in compelling election, was thus described by the lord chancellor in a leading case:[6] A person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can. If, therefore, a testator, intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person

[1] Bellasis v. Uthwatt, 1 Atk. 427 and note, where the cases are collected.

[2] Rider v. Wager, 2 P. Wms. 331. R. S. 84, § 14.

[3] Id.

[4] Co. Litt. 264 b.

[5] 2 R. S. 84, § 13.

[6] Thellusson v. Woodforth, 13 Ves. 219. Dillon v. Parker, 1 Swanst. 396, note of Mr. Swanston; and Hare & Wallace's note to Streatfield v. Streatfield. 1 White's Equity Cas. 258 et seq. Noys v. Mordaunt, 2 Vern. 581.

or property as to which another person had a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, when it is in his power, and yet take under the will. The reason is, the implied condition that he shall not take both, and the consequence follows that there must be an election; for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator.[1]

In every case of election there must be an intention to dispose of that over which the testator has no power of disposition.[2] The intention of the testator must be plain and manifest.[3] The property intended to be disposed of must be described with certainty.[4] And the intention of the testator must be manifested by the will, for it seems that parol evidence is inadmissible for the purpose of showing it.[5]

The doctrine of election may be thus illustrated: Suppose A., by will or deed, gives to B. property belonging to C., and by the same instrument gives other property to C., a court of equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favor of B.; he must consequently make his choses, or, as it is technically termed, he is put to election to take either under, or against the instrument. If C. elects to take under, and consequently to conform to all the provisions of the instrument, no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A. But if C. elects to take against the instrument, that is to say, retains his own property, and at the same time sets up a claim to the property given to him by A., an important question arises whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or, is merely bound to make compensation out of it to the person who is disappointed by his election.[6]

There are many dicta in favor of the doctrine of forfeiture.[7] But the weight of modern authority is in favor of the principle of compensation.[8]

[1] Hawley v. James, 16 Wend. 62–142.

[2] Thellusson v. Woodford, 13 Ves. 222.

[3] Rancliffe v. Parkyns, 6 Dow, 176.

[4] Druce v. Denison, 6 Ves. 399.

[5] Stratton v. Best, 1 Ves. jr. 284.

[6] Note to Streatfield v. Streatfield, 1 White's Eq. Cas. 258.

[7] Cowper v. Scott, 3 P. Wms. 124. Morris v. Burroughs, 1 Atk. 404. Pugh v. Smith, 2 id. 43. Wilson v. Mount, 3 Ves. 194. Wilson v. Townshend, 2 Ves. jr. 697. Thellusson v. Woodford, 13 Ves. 220.

[8] Whistler v. Webster, 2 Ves. jr. 372. Ward v. Baugh, 4 Ves. 627. Lady Cavan v. Pulteney, 2 Ves. jr. 560. Blake v. Bunbury, 1 id. 523. Welby v. Welby, 2 V. & B. 190, 191. Webster v. Milford, 2 Eq. Ca. Abr. 363. Bor v. Bor, 3 Bro. P. C., Toml. ed. 167. Ardesoif v. Bennet,

Lord Eldon in Ker v. Wanchope, (supra,) says: "In our courts we have engrafted upon this primary doctrine of election, the equity as it is termed of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A. or any part of it should be given to B: if the devisee will not comply with the condition of the will, courts of equity hold that another condition is to be implied as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heirs at law should not take his estate which he gives A. in consideration of his giving his estate to B.; if A refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him."

Mr. Swanston, after reviewing the cases in his learned note to Gretton v. Haward, (1 Swanst. 433,) shows that they establish two propositions: 1st. That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. 2d. That the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

This doctrine of election applies to interests, immediate, remote, contingent, of value, or not of value.[1] It is applicable to deeds as well as wills. And it is immaterial whether the testator or grantor knew the property not to be his own or not; for in either case, if the intention to dispose of it clearly appears, his disposition will be sufficient to raise a case of election.[2]

The doctrine of election, in this state, most frequently arises in relation to legacies or devises by the testator to his widow. The questions presented, generally, are whether the testamentary dispositions in her favor were intended to be in lieu of dower, or merely a bounty. If the legacy be in *express* terms declared to be in lieu of dower, the widow, it should seem, is necessarily put to her election, for she cannot take both. The Revised Statutes have made full provision on this subject, in affirmance of the common law; and they furthermore enact, that she shall be deemed to have elected her jointure, devise or pecuniary provision, unless

2 Dick. 465. Lewis v. King, 2 Bro. C. C. 600. Freke v. Barrington, 3 id. 284. Lord Eldon in Dashwood v. Peyton, 18 Ves. 49. Tibbits v. Tibbits, Jac. 317. Lord Rancliffe v. Parkyns, 6 Dow, 179. Ker v. Wanchope 1 Bligh, 25.

[1] Wilson v. Townshend, 2 Ves. jr. 697 Webb v. Earl of Shaftsbury, 7 Ves. 480.

[2] Whistler v. Webster, 2 Ves. jr. 370. Thellusson v. Woodford, 13 Ves. 221. Welby v. Welby, 2 Ves. & B. 199.

within one year after the death of her husband, she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment of it.[1]

But it is in cases where the legacy or devise is not, in *express terms*, declared to be in lieu of dower, that there is any room for argument or doubt. As the right of dower is a legal right, the wife cannot be deprived of it by a testamentary provision in her favor, so as to put her to an election, unless the testator has manifested his intention to deprive her of dower, either by express words or necessary implication.[2] And to enable us to deduce such implied intention, the claim of dower must be inconsistent with the will, or repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will.[3]

A brief examination of some of the cases will best illustrate the rules on this subject.

In Adsit v. Adsit, (supra,) the testator bequeathed to his wife $500, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require;" and also gave her what household goods she needed; and after bequeathing pecuniary legacies to his grandchildren, directed his farm to be sold by his executors, who sold it for $6000, and the wife, after the death of the testator, accepted the legacy, which was paid to her out of the proceeds of the sale of the farm. It was held by Chancellor Kent, that the legacy was not, according to a fair construction of the will, given in lieu of, or in bar of dower, but as a mere pecuniary bequest: that the acceptance of it by the widow did not affect her right to dower; and that the purchaser of the farm took it subject to the claim of dower. The great point in the case was whether the legacy, which purported to have been given for the "*support*" of the widow, afforded clear and undoubted evidence that it was intended as a substitute for dower. Every devise or bequest, as was well remarked, imports bounty, and does not naturally imply satisfaction of a pre-existing incumbrance. The fact that it fell short of the legal provision, and that it was not given absolutely out and out, but was left *in the hands of the executors*, and to be paid to her, *as her need might require*, was thought to afford evidence that it was not intended in lieu of dower, but as auxiliary support. The chancellor thought it was intended as a gratuity, or as a cumulative provision, and created for greater caution. Of course the acceptance of it by the legatee was not

[1] 1 R. S. 741, 742, §§ 9 to 14.

[2] Fuller v. Yates, 8 Paige, 328.

[3] Adsit v. Adsit, 2 J. Ch. 451. Lasher v. Lasher, 13 Barb. 106. Smith v. Knickern. 4 J. C. R. 9.

inconsistent with her claim of dower, nor was the assertion of her claim to dower repugnant to, or destructive of any provision in the will.

In general, when the testamentary provision is not declared, in express terms, to be in lieu of dower, if it be of shorter continuance than an estate in dower, or be charged with a burden, the court will not *imply* that it was intended to be a substitute for dower.

In Bull v. Church,[1] the testator bequeathed to his wife "all his property, real and personal, during her natural life, or as long as she shall remain my widow. After my beloved wife's decease, or if she should marry again, I will and order my property to be divided in the following manner." The widow continued in possession for some years, and then married, and in an action brought by her for her dower, after such marriage, the question was, whether the legacy was a bar to dower. The supreme court held that it was not, and their judgment was affirmed by the court of errors.

The estate given to the wife in this case would have been greater than her dower, had she remained a widow during life, and in that case the question could not have arisen. It was, however, a less estate than her dower, because it terminated at her marriage. It was not expressed to be in lieu of dower. A testamentary provision for the wife is deemed a gratuity or benevolence, which she may take in addition to her dower, unless the testator has plainly manifested a different intention, as by saying that the gift is in lieu or bar of dower. Her claim to dower, said Bronson, J., is no more inconsistent with the will than it would be in any other case, where, after making a provision for the wife, the testator has given lands to another, without saying any thing about dower, and in such a case the widow shall have dower, in addition to the provision made by the will.[2] And the chancellor, in giving the opinion of the court of errors, in the same case, gives it as the result of all the cases, in this state and in England, that to compel the widow to elect between the dower and a provision made for her in the will, when the testator has not *in terms* declared his intention on the subject, it is not sufficient that the will renders it doubtful whether he intended that she should have her dower, in addition to that provision; but that to deprive her of dower, the terms and provisions of his will must be *totally inconsistent* with her claim of dower in the property in which such dower is claimed; so that

[1] 5 Hill, 206; S. C., 2 Denio, 430.

[2] Allen v. Pray, 3 Fairf. 138. Reed v. Dickerman, 12 Pick. 146.

the intention of the testator in relation to some part of the property devised to others would be defeated if such claim was allowed.[1]

The doctrine of the New-York cases is not different in this respect from that in the most recent English cases. Vice Chancellor Wigram, in a recent case,[2] says, "I take the law to be clearly settled at this day, that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, *per se*, express an intention to devise the lands otherwise than subject to its legal incidents, *that of dower included*. There must be something more in the will, something inconsistent with the enjoyment by the widow of her dower, by metes and bounds, or the devise standing alone will be construed as I have stated." And this doctrine was approved by the chancellor in Church v. Bull.

In Lasher v. Lasher,[3] the question arose in an action by the widow for her legacy, after she had had her dower set off to her. The testator devised to the defendant 100 acres of his home lot and 15 acres of woodland in fee, charged with the payment of a small legacy to each of his three sisters, and the will then proceeded thus: "I also will and order that my said wife be well and sufficiently supported and maintained by my son Elias out of the property bequeathed to him, so long as she *may remain my widow*." The widow having had her dower assigned to her, brought her action against the devisee upon whom her support, during widowhood, was charged, and a recovery was resisted upon the ground that by accepting her dower, she had relinquished her claim to the support provided for in the will. But the court held, that as the testamentary disposition in her favor was not expressed to be in lieu of dower, and the provisions of the will were not inconsistent with her claim, she was not put to her election.

In the above case the testamentary provision in favor of the widow was of *shorter continuance* than her dower, being limited to her widowhood; and was also charged with *a burden*, viz. the furnishing a home with her to two of her daughters while they remained single. In the absence of any express declaration that such a legacy shall be in lieu of dower, the law will not imply it. The whole provision would terminate by the marriage of the legatee, and might be exhausted by the burden cast upon it.

Nor will the law *imply* that a legacy to the widow is in lieu of dower, because the testator by the same will devises his real estate to trustees for specified purposes, or to a devisee beneficially. There must be something

[1] Church v. Bull, 2 Denio, 431.
[2] Ellis v. Lewis, 3 Hare, 310, 313.
[3] 13 Barb. 106.

more to indicate that purpose, or the devise must be inconsistent with the claim of dower.[1]

In Fuller v. Yates, (supra,) the testator devised all his real and personal estate to his executors and trustees, with directions to them to lay out certain portions of his lands into village lots, and to sell them from time to time as they might be wanted for building lots, and with power to sell any other parts of the estate they might deem necessary to fulfill the objects of his will, and gave to his widow the possession and direction of his dwelling house and Walnut Grove farm, and an annuity of $2000, and a further annuity of $500 to keep up the garden and improve the property, and also the use of his library and certain pleasure carriages, horses, &c.; it was held by the chancellor that the widow was entitled to dower in the testator's real estate, in addition to the devises and bequests in her favor in the will.

Though in this case, taking the whole disposition into consideration, it could hardly be said that the testator intended that his wife should have her dower, in addition to the testamentary dispositions in her favor; and probably if the question of dower had occurred to him, he would have inserted a provision in the will declaring the dispositions in her favor to be in lieu of dower in the residue of his estate; yet, it was well observed by the chancellor that it was not sufficient to bar dower, that the testator *did not think on the subject;* as that would only indicate a want of intention either one way or the other. To exclude the widow's right to dower, the *will itself* must show that he probably did contemplate the subject, and intended that the testamentary provision for the wife should exclude her from all claim to dower, if she elected to take them.[2]

So a devise of all the testator's real and personal estate to a trustee, to be sold and converted into money, and to pay the widow an annuity out of the income of the mixed fund, composed of the proceeds of the real and personal property, is not of itself sufficient to show that the testator intended this provision for the widow to be in lieu of dower, so as to compel her to elect between such annuity and her dower in the real estate.[3]

Nor is it enough to deprive the wife of her dower, or to compel her to elect, that the provisions of the will render it *doubtful* whether the testator intended she should have her dower, in addition to the provision made for her by the will. The terms and provisions of the will must be such as to show an evident intention, on the part of the testator, to

[1] Ellis v. Lewis, 3 Hare, 310. Adsit v. Adsit, 2 J. Ch. R. 451. Fuller v Yates, 8 Paige, 325.

[2] Fuller v. Yates, 8 Paige, 331.

[3] Wood v. Wood, 5 Paige, 596.

exclude the claim of dower. The provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower.[1]

Thus, where a testator devised all his property, real and personal, to his wife and to two other persons, to be kept for her use and support so long as she should continue his widow, and until his youngest child should become of age, and then directed that all his property should be divided equally among his children; and she survived the testator, and afterwards married a second time, it was held that the devise in her favor was not inconsistent with her claim of dower in the testator's real estate, after his youngest child arrived at the age of twenty-one, and that her acceptance of the devise was no bar to such claim of dower.[2]

When the whole of the property is conveyed by one general devise, if there be one part of the property, with respect to which it is clear that the testator did not intend that it should be subject to the claim of dower, it follows that he did not intend that any portion of it should be subject to dower: and in such case the wife is necessarily put to her election.[3] But whether a mere charge of an annuity upon the land in favor of a widow with a clause of entry and distress, would be sufficient to put her to her election, has, in England, given rise to a contrariety of decisions, and was left undecided in Roadley v. Dixon.[4] If the annuity be chargeable on both *real and personal* property of the estate, and be not confined to the land alone out of which dower is claimed, the cases in this state show that the wife is not put to her election, but that she takes the legacy as a bounty and her dower also.[5]

Although the doctrine of election we are considering is in truth a part of equity jurisprudence, and it is in courts of equity that relief is in general sought, yet the principles on which the court acts are in all respects the same at law as in equity, when the issue is so shaped as to require their application.[6] In an early case, Thompson, J., said, that to render a provision to the wife by will a *legal bar* to dower, it must consist of lands given or assured unto her *for life;* but such a sum of money, or other chattel interest, given by will in lieu of dower, will, if accepted

[1] Sanford v. Jackson, 10 Paige, 269.

[2] Id. 266.

[3] Roadley v. Dixon, 3 Russ. 193. Miall v. Brain, 4 Mad. Ch. R. 68. Butcher v. Kemp, 5 id. 61.

[4] 3 Russ. 296, and see the cases reviewed in that cause, and White's Eq. Cases, note, 284, 285.

[5] Smith v. Kniskern 4 J Ch. R. 9. I shall not attempt to reconcile the cases in the other states. They are ably reviewed in the note, in White's Equity Cases, to Streatfield v. Streatfield, vol. 1, 272-289, to which the reader is referred.

[6] Van Orden v. Van Orden, 10 J. R. 30. Jackson v. Churchill, 7 Cowen, 287. Ball v. Church, 7 Hill, 287; S. C., 2 Denio, 430.

by the wife, after her husband's death, constitute an *equitable bar* of her dower.[1] But this distinction is abrogated by the Revised Statutes, which enact that if lands be devised to a woman, or a pecuniary or other provision be made for her by will, in lieu of dower, she shall make her election, whether she will take the lands so devised, or the provision so made, or whether she will be endowed of the lands of her husband.[2] And the statute, furthermore, deems her to have elected the testamentary provision, unless within a year after the death of her husband, she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof.[3] And Savage, Ch. J., in one case said, that though the provision by will was called an *equitable* bar to dower, he apprehended it was also a *legal bar*.[4] It clearly is so since the statute, whatever was the rule before.

A bequest in lieu of dower, and the acceptance of the same, amounts to a matter of contract, and the wife is to be paid the bequest in preference to other legacies, and without abatement.[5] To protect such legacy, when accepted, if there be a deficiency of assets to pay debts, the real estate may be resorted to in exoneration of what is specifically bequeathed to the widow.[6]

If an annuity and a devise and bequest be given to the widow in lieu of dower, and the annuity fail, because the fund out of which it was made payable was illegally created, she still has the right, if she sees fit, to accept of a part of what was intended by the testator as an equivalent for her dower, and to relinquish her dower for that consideration alone. Even in such a case, if she has precluded herself from claiming dower, by receiving the annuity given her by the will, in lieu of dower, and by neglecting to commence proceedings for the recovery thereof within a year from the death of her husband, she is not bound, in equity, by that election, except as against bona fide purchasers or mortgagees, but may nevertheless assert her claim to dower.[7]

[1] Larabee v. Van Alstyne, 1 J. R. 308. Jones v. Powell, 6 J. Ch. R. 194.

[2] 1 R. S. 741, § 13.

[3] Id. § 14.

[4] Kennedy v. Mills, 13 Wend. 553.

[5] Isenhart v. Brown, 1 Edw. 411. Burridge v. Bradyl, 1 P. Wms. 127. Heath v. Dendy, 1 Russ. 543.

[6] Isenhart v. Brown, supra.

[7] Hone v. Van Schaick, 7 Paige, 232.

SECTION XII.

OF DONATIO MORTIS CAUSA.

IN bringing this branch of the subject to a close, it will be proper to notice the subject of *donatio mortis causa*. This species of gift is not, in strictness, a legacy, but is in the nature of a legacy; and although it is cognizable in many instances in courts of law, it is mainly in courts of equity that questions with respect to it are raised and discussed, and it belongs, therefore, appropriately to equity jurisprudence.

A *donatio mortis causa* is a gift made by a person during his last illness, or in peril of death, which is perfected by an actual delivery, but which is revocable during the donor's life, and is only intended to be absolute in case of the donee's surviving.[1] This definition contemplates an *actual* delivery of the subject of the gift, which was not in terms required by the Roman law. The *donatio mortis causa* is thus defined in the civil law: "*Mortis causa donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is, qui accipit: sin autem supervixisset is, qui donavit, reciperet: vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.*"[2] In the civil law this gift was considered more in the nature of a legacy than with us.

There are three principal circumstances essential to constitute this species of gift by our law, viz. 1. The gift must be made with a view to the donor's death; 2. It must be conditioned to take effect on the death of the donor, by his existing disorder; and 3. It must be accompanied with an actual, or at least a symbolical delivery of the subject of the gift.[3] A few remarks will be made upon these several requisites.

(1.) The gift must be made with a view to the donor's death. Gifts of this kind, said Sir Joseph Jekyl, master of the rolls, on one occasion,

[1] Tate v. Hilbert, 2 Ves. jr. 111. Craig v. Craig, 3 Barb. Ch. R. 117. Bac. Abr. tit. Leg. A. Harris v. Clark, 2 Barb. S. C. R. 96; S. C. on appeal, 3 Comst. 114.

[2] Institute, lib. 2, tit. 7, and may be thus rendered: "A donation *mortis causa* is made under apprehension of death; as where any thing is given upon condition, that if the donor dies, the donee shall possess it absolutely; or return it, if the donor should survive; or should repent of having made the gift; or if the donee should die before the donor."

[3] Harris v. Clark, 2 Barb. S. C. R. 96. 3 Comst. 114. Parish v. Stone, 14 Pick. 203, 204.

are not good, unless made by the party in his last sickness.[1] If the gift be made in the donor's last sickness, and especially if so made not long before his death, it will be implied that it was made with reference to his death. But if a gift be made under no present peril of death, but under the consideration of man's mortality in general, or if it be given with an intention that it should take effect immediately, and be irrevocable, it may be a good gift *inter vivos*, but is not a *donatio mortis causa*.[2]

(2.) It must be conditioned to take effect only on the death of the donor, by his then existing illness. This condition, it seems, need not be declared, but will be presumed, if the contrary be not expressed, provided the donor die of the then present indisposition.[3] Thus, in Gardner v. Parker, (supra,) the testator being dangerously ill and confined to his bed, two days before his death, in the presence of a servant, gave the plaintiff a bond for £1800, saying at the time, "*There, take that and keep it*," the question arose between the plaintiff claiming the bond as a *donatio mortis causa*, and the defendants, who were the executors of the donor, and the objection was that the gift was not, at the time, declared to be in contemplation of immediate death. Sir John Leach, vice chancellor, said, "the doubt here is, that the donor has not expressed that the bond was to be returned to him if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of the death."

(3.) There must be a *delivery* of the subject of the gift. Delivery is essential to a gift in all cases, whether made to take effect immediately, or intended merely as a *donatio mortis causa*.[4]

There are cases where an actual delivery is impracticable, and where a symbolical delivery is the usual mode of transferring the title. Thus, the delivery of the key of a warehouse, or other place, in which bulky goods are deposited, has been determined to be a valid delivery of the goods, for the purpose of a *donatio mortis causa*.[5]

[1] Miller v. Miller, 3 P. Wms. 357. Tate v. Hilbert, 2 Ves. jr. 120. Lawson v. Lawson, 1 P. Wms. 441. Gardner v. Parker, 3 Mad. Ch. R. 184. Harris v. Clark, 2 Barb. S. C. R. 96.

[2] See the same cases.

[3] Gardner v. Parker, 3 Mad. Ch. R. 184. Irons v. Smallpiece, 2 Barn. & Ald. 553, per Abbott, Ch. J. Tate v. Hilbert, 2 Ves. jr. 120. Harris v. Clark, 3 Comst. 114.

[4] Harris v. Clark, 3 Comst. 113. Noble v. Smith, 2 J. R. 56. Irons v. Smallpiece, 2 Barn. & Ald. 553. Drury v. Smith, 1 P. Wms. 404. Craig v. Craig, 3 Barb. Ch. R. 76.

[5] Smith v. Smith, 2 Str. 955. Ward v. Turner, 2 Ves. sen. 443. Wilkes v. Ferris. 5 J. R. 335.

A debt due may be discharged by a *donatio mortis causa*, by destroying the bond or other evidence of debt.[1] The destruction of the evidence of debt, with an intention of discharging the debt, is equivalent to an actual delivery.

With regard to the kind of property which may be the subject of a *donatio mortis causa*, it should seem that any chattel which passes by delivery, may be the subject of such gift. Hence, a bond, or a bond and mortgage, and all negotiable instruments which pass merely by delivery, fall within the rule.[2] And a delivery to a third party, for the benefit of the donee, is sufficient.[3]

But where no title passes by mere delivery, there can be no valid gift. Hence the executory promise of a person, without a consideration to support it, cannot be made the subject of a *donatio mortis causa*. Thus, a promissory note by the donor, payable to the intended donee, or a draft in his favor, are not available as such gift within the rule.[4] Neither a promissory note, or any other executory contract for the payment of money or delivery of a chattel, can be enforced between the original parties, unless made upon a valuable consideration.[5] The payee in such an instrument stands in no better plight, after the death of the maker, than during his life; and if he could not enforce it against the original party while living, much less can he enforce it against his executors or administrators after his death.

From what has already been said, it is obvious that a *donatio mortis causa* in some respects resembles a legacy, and in other respects resembles a gift *inter vivos;* and that it is distinguishable from both in several respects. It differs from a legacy in not requiring the assent of the executor, or the proof of it in the surrogate's court. As the gift takes effect from the delivery, the title to it is derived directly from the donor,

[1] Gardner v. Gardner, 22 Wend. 526.

[2] Coutant v. Schuyler, 1 Paige, 316. Duffield v. Elwes, 1 Bligh, N. S. 497. Grover v. Grover, 24 Pick. 261. Snellgrove v. Bailey, 3 Atk. 214. Gardner v. Parker, 3 Mad. Ch. R. 184. Harris v. Clark, 2 Barb. S. C. R. 98; S. C., 3 Comst. 93.

[3] Coutant v. Schuyler, 1 Paige, 316.

[4] Harris v. Clark, 2 Barb. S. C. R. 94; S. C. affirmed on appeal, 3 Comst. 93. Craig v. Craig, 3 Barb. Ch. R. 116. Parish v. Stone, 14 Pick. 199. Raymond v. Sellick, 10 Conn. 485. 6 N. H. 386. 2 Gill & John. 217. Holly v. Adams, 16 Vt. 206, overruling Wright v. Wright, 1 Cowen, 598. N. B. Wright v. Wright was probably erroneously reported. It was never followed in this state, and was overruled at the first opportunity.

[5] Pearson v. Pearson, 7 J. R. 26. Fink v. Cox, 18 J. R. 145. Holliday v. Atkinson, 5 Barn. & Cress. 501. Harris v. Clark, 3 Comst. 113. Parish v. Stone, 14 Pick. 205, 206.

and not from the executor or administrator of the donor. Indeed, it is usually claimed in hostility to the latter.[1]

A *donatio mortis causa* differs from a gift *inter vivos*, in that it is revocable during the life of the donor, and may be made to the wife of the donor.[2] It is liable also, on a deficiency of assets, to the debts of the testator.[3] In all these respects it resembles a legacy.

It follows, too, from what has been said, that the gift is revoked, by the recovery of the donor from the illness under which he was suffering when the gift was made.[4]

SECTION XIII.

OF ABATEMENT OF LEGACIES; AND THE PERSON TO WHOM PAYABLE.

IN considering the general subject of legacies, and of a *donatio mortis causa*, it has been assumed that there has been no deficiency of assets to satisfy the debts of the testator. But as every man must be just before he is generous, the laws of the land as well as the principles of natural justice require that the payment of the debts of the deceased should have preference over such claims as rest only upon the testator's bounty. If the testator's property is exhausted in the payment of debts, all the legacies must fail. If there be enough property to satisfy the debts and to pay the legacies in part, another question arises in which the aid of a court of equity is necessary, with respect to the principles on which an abatement shall be made among the several legatees.

General legacies, unless there be an indication in the will of a contrary intention, abate ratably in case of a deficiency of assets; but legacies for the erection of suitable head stones at the graves of the testator's relatives, and legacies founded upon a prior indebtedness, or a valuable

[1] Miller v. Miller, 3 P. Wms. 356. Duffield v. Elwes, 1 Sim. & Stu. 245, per the V. Ch.

[2] Lawson v. Lawson, 1 P. Wms. 441.

[3] Drury v. Smith, 1 P. Wms. 406.

[4] Hedges v. Hedges, Prec. in Ch. 269. 2 Vern. 615.

The limits of this treatise will not permit a more enlarged discussion of the subject of *donatio mortis causa*. The attention of the reader is invited to the case of Headly v. Kirby, decided in May, 1852, by the supreme court of Pennsylvania, and reported in the American Law Register, vol. 1, No. 1, and to an article on the same subject, by the learned editor, in the same volume, p. 1.

consideration, do not so abate, but must be paid in full, though the assets are not sufficient to pay all the general legacies.[1] So a legacy in lieu of dower does not abate ratably with other general legacies.[2] In general speaking, there is no abatement in the case of specific legacies; the specific legacies being preferred, in this respect, to general legacies, but both must yield to the claim of creditors.[3] The principles of the decisions of the courts of equity on this subject are in substance adopted by the Revised Statutes of New-York, which require, first, the payment of the debts of the testator, and next, the discharge of the *specific* legacies bequeathed in the will, and then the payment of the *general legacies*, if there be assets; and if there be not sufficient assets, then an abatement of the *general legacies* shall be made in equal proportions.[4] A residuary legatee has no right to call upon particular *general legatees* to abate. The whole personal estate not specifically bequeathed must be exhausted, before those legatees can be obliged to contribute any thing out of their bequest.[5] In our law, particular general legatees are preferred before the residuary legatees, (though it was otherwise in the Roman law,) the residuum being by us considered as the gleanings of the testator's estate.[6]

There is a distinction, of some importance, running through the cases, between an original deficiency of assets, and where the assets were sufficient, but have been wasted by the executor. In the former case, a legatee who has been paid more than his proportion, under the deficiency, must refund; but in the latter case, he is not obliged to, for he has received no more than what was due to him, and the other legatees must look to the executor. The legatee who has been paid shall retain the advantage of his legal diligence.[7]

A legacy, general in its nature, though directed to be applied to a particular purpose, other than the payment of debts, or the removal of a charge on the estate, is not entitled to any exemption from abatement. Thus, a legacy to an executor for care and trouble, and a legacy to charities, have no preference over other general legacies.[8]

With regard to *demonstrative* legacies, being bequests with reference

[1] Wood v. Vandenburgh, 6 Paige, 177. Masters v. Masters, 1 P. Wms. 423.

[2] Williamson v. Williamson, 6 Paige, 298.

[3] Clifton v. Burt, 1 P. Wms. 680.

[4] 2 R. S. 87–90, §§ 27, 45.

[5] Purse v. Snaplin, 1 Atk. 418. Id. King v. Strong, 9 Paige, 94. James v. James, 4 id. 115. Bowers v. Smith, 10 id. 193.

[7] Lupton v. Lupton, 2 J. Ch. R. 626 1 P. Wms. 495, per Sir Joseph Jekyl. Wolcott v. Hall, 2 Bro. 305.

[8] Fretwell v. Stacy, 2 Vern. 434. Morris v. Kent, 2 Edw. 175. Att'y Gen. v. Robbins, 2 P. Wms. 25.

to a particular fund for their payment, and not simply a gift of the fund itself, it has been held that they so far partake of the nature of specific legacies that they will not be compelled to abate with general legacies; it being plainly the intention of the testator that they should have priority over other general legacies, not made with reference to a specific fund.[1]

The question to whom a legacy is payable, is in all cases one of the utmost importance, and in some instances cannot be settled without the aid of a court of equity. If the legatee be an infant, the general rule is that it is not payable to his parent, unless such parent be appointed the guardian of the infant by a court of equity and give ample security for the discharge of his trust.[2] As guardian by nature, the parent is not, independently of statute regulations, entitled to receive it. In this state, in case any legatee is a minor, his legacy, if under the value of fifty dollars, may be paid to his father, to the use and for the benefit of such minor.[3] If the legacy be of the value of fifty dollars or more, the same may, under the direction of the surrogate, be paid to the general guardian of the minor; who shall be required to give security to the minor, to be approved of by the surrogate, for the faithful application and accounting for such legacy.[4] If there be no such guardian, or the surrogate do not direct such payment, the legacy shall be invested in permanent securities, under the direction of the surrogate, in the name and for the benefit of such minor, upon annual interest; and the interest may be applied, under the direction of the surrogate, to the support and education of the minor.[5]

And by the act to incorporate the New-York Life Insurance and Trust Company,[6] the corporation thus created is authorized to receive moneys in trust, to accumulate the same at such rate of interest as may be obtained or agreed upon, or to allow such interest thereon as may be agreed on, not exceeding in either case the legal rate. And in all cases where an application shall be made to the court of chancery, now the supreme court, or to a surrogate having jurisdiction for the appointment of a guardian of any infant, the annual income of whose estate shall exceed the sum of one hundred dollars, the court or surrogate has power to

[1] Roberts v. Pocock, 4 Ves. 150. Enders v. Enders, 2 Barb. S. C. R. 367.

[2] Genet v. Tallmadge, 1 J. Ch. R. 3. Morrell v. Dickey, id. 153.

[3] 2 R. S. 91, § 46.

[4] Id. § 47.

[5] Id. § 48.

[6] Laws of 1830, p. 76.

appoint the said company as guardian of the estate of such infant, without requiring from the company any bond or other collateral security.[1]

If a legacy be given to a married woman, without any particular direction as to its payment, it must be paid to the husband, even though the husband and wife live separate and apart.[2] But if the husband resorts to the aid of a court of equity to obtain a legacy bequeathed to his wife, he must, if he has not already made a suitable provision for her, do what is equitable, by making a suitable provision out of it for the maintenance of her and her children. And the rule is the same whether the husband applies to the court himself, or a suit for the wife's debt, legacy, portion, &c. is brought by his legal representatives; and the extent of the provision will depend on the circumstances of the case.[3] This is called the wife's equity, and will be more fully considered under a subsequent head relative to the rights of married women. And now, by statute, any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable to his debts.[4]

But independently of the statute, if the legacy or bequest be made to the separate use of a married woman, or where it is given *for her own use and to be at her own disposal*, she alone can give a discharge for it; and it is properly payable by the executors to her alone and not to her husband.[5] And the court of chancery will protect her interest against the creditors of the husband, although there be no trustee named in the will.[6]

In conclusion, on this point, it is proper to add, that in this state, since the Revised Statutes, an executor or administrator has no right to retain the property of the deceased, in satisfaction of his own debt, or claim, until it shall have been proved to and allowed by the surrogate, and such

[1] Laws of 1830, p. 77, §§ 3, 6.

[2] Palmer v. Trevor, 1 Vern. 251. Chamberlain v. Hewson, 1 Salk. 115; S. C., 1 Ld. Ray. 73. Howard v. Moffatt, 2 J. Ch. R. 206.

[3] Howard v. Moffatt, 2 J. Ch. R. 206. Turrel v. Turrel, id. 391. Van Epps v. Van Deusen, 4 Paige, 64.

[4] L. of 1848, p. 307. L. of 1849, p. 528, same act amended.

[5] Shirley v. Shirley, 9 Paige. 363. Prichard v. Ames, 1 Turner, 222. Newland v. Paynter, 4 Myl. & Cr. 408.

[6] Same cases.

debt or claim shall not be entitled to any preference over others of the same class.[1]

Although an extensive jurisdiction is conferred upon surrogates' courts over the administration of the estates of deceased persons, and although an action at law can, in many cases, be maintained by a legatee against the executor to recovers a legacy, still, the jurisdiction of the court of chancery, now the supreme court, is in all cases concurrent, and in some cases exclusive.[2] If, for example, legacies be charged upon real estate, or there be other trusts to execute than the ordinary trusts appertaining to the office of executor, or, from the situation of the property or the parties, the surrogate has no jurisdiction, the remedy is solely in equity A surrogate, upon the settlement and distribution of an estate, is competent to liquidate an equitable, as well as a legal demand;[3] and where a will directs the legal estate to be sold, and makes but one fund of the real and personal property of the testator for the purposes of the will, and the trust to receive rents and profits prior to the sale is a mere incident of the power to sell, the surrogate has jurisdiction to call the executor to account for the whole estate, including as well the rents and profits, and the proceeds of the real estate, as the personal property.[4] But still the surrogate's court is a court of inferior and limited jurisdiction, and those claiming under its decree must show affirmatively that the surrogate had authority to make the decree, and that the facts upon which he acted gave him jurisdiction of the subject matter and of the persons before him.[5] Hence, in cases of importance, and especially if the facts be complicated, or the question of jurisdiction be doubtful, the parties will in general resort to equity for aid in bringing to a close the administration of the estate of a deceased person.

The jurisdiction of courts of equity in this matter owes its origin, in a great degree, to the undoubted jurisdiction of the court over matters of trust. Equity treats the executor or administrator, as the case may be, who has in his hands the property of the testator or intestate, as a trustee; and holds him bound to apply the property to the payment of the debts of the deceased, and if any remains, to distribute it among his legatees, if any, or among his kindred, according to the statute of distributions.

[1] 2 R. S. 88, § 33. L. of 1837, p. 531, § 37.

[2] 2 R. S. 92 et seq. Id. 450.

[3] Payne v. Mathews, 6 Paige, 19.

[4] Stagg v. Jackson, 2 Barb. Ch. R. 86; affirmed, 1 Comst. 206.

[5] Dakin v. Hudson, 6 Cowen, 221. Bloom v. Burdick, 1 Hill, 130. Corwin v. Merritt, 3 Barb. S. C. R. 341. Dakin v. Deming, 6 Paige, 95. People v. Barnes, 12 Wend. 492. Same v. Corlies 1 Sandf. S. C. R. 228.

There may be and doubtless are other grounds of jurisdiction; such as the necessity of taking accounts, and obtaining discovery; the imperfection or inadequacy of the remedy at law, or in the surrogate's court; and the necessity, in some cases, of obtaining an injunction against a misapplication of the funds pending the litigation. But whatever be the origin of the jurisdiction, it has been exerted for more than a century, and is amongst the most important and least contested of its powers.[1]

The application for relief in the administration of estates is sometimes made by the executors or administrators themselves, when the affairs of the estate are so involved that they cannot safely be administered without the aid of the court. It is sometimes made in behalf of specific legatees to marshal assets in their favor against the heir.[2] It is perhaps more frequently made in behalf of creditors, seeking a discovery of assets, and a proper application of them to the debts of the deceased.[3] And it is sometimes done by the court itself, where there are divers suits for legacies, and there is an allegation of a deficiency of the fund, in order that an account may be taken in one cause, and the defendant be protected from unnecessary trouble and expense. In such case, all the parties interested in the fund are allowed to come in under the decree.[4] It is matter of discretion with the court, in such cases, in which action the account will be taken.

SECTION XIV.

OF ADMINISTRATION AND MARSHALING ASSETS.

THE doctrine of marshaling assets in behalf of legatees, creditors or distributees, is analogous to that of marshaling securities in favor of creditors and sureties, which has already been considered. It rests upon the general principle of equity, that if a claimant has two funds to which he may resort, a person having an interest in one only,

[1] Bac. Abr. Leg. M. 1 Mad. Ch. Pr. 466. Adair v. Shaw, 1 Sch. & Lefr. 262. Farrington v. Knightly, 1 P. Wms. 549, and note 550. Duke of Rutland v. Rutland, 2 id. 210. Hovey v. Blakeman, 4 Ves. 607. Ripley v. Waterworth, 7 id. 452. 7 id. 197.

[2] Livingston v. Livingston, 3 J. Ch. R. 148.

[3] Thompson v. Brown, 4 J. Ch. R. 631.

[4] Ross v. Crary, 1 Paige, 416. Kettle v. Crary, id. note.

has a right to compel the former to resort to the other, if that becomes necessary to satisfy both.[1]

Assets are either real or personal, and legal or equitable. *Legal assets* are such as constitute the fund for the payment of debts according to their legal priority. *Equitable assets* are such as can be reached only by the aid of a court of equity, and are divisible *pari passu* among all the creditors.[2] Every thing may be considered as equitable assets, which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to his debts generally.[3] The general doctrine is to encourage, as much as possible, the idea of equitable assets, because *equality* in the payment of debts is equity, and the rule of distribution in chancery is founded on principles of natural justice.[4]

Again: Assets may be partly legal and partly equitable, and the court will discriminate in the distribution of them, following the rule of law as to the legal assets, so as to prevent confusion in the administration of the estate, but directing the equitable assets to be applied ratably among all the creditors without preference.[5] Under this rule legal assets will be distributed among the creditors according to their legal priorities, but those who take of the legal assets will receive no part of the equitable assets, until they shall have been so applied as to produce equality among all.[6]

In one case,[7] it was said, that previous to the decision of the chancellor in Thompson v. Brown, (supra,) it was well settled, that in a court of equity legal assets must be distributed according to the common law, in a due course of administration, and that the court only refused to give a preference to one debt over another of the same class; that is, that all the judgments against the deceased which were not, at law, a lien upon the fund to be distributed, must be paid in the first place, but ratably only, and without regard to the time in which they were entered; and debts of the several other classes in the same manner; that it was only judgments or decrees obtained against the personal representatives which gave the creditors, obtaining such judgments, a privilege over other creditors whose debts were originally of the same class. The expression in

[1] Aldrich v. Cooper, 8 Ves. 388, and notes to the same in White's Eq. Cas. vol. 2, 184 et seq.

[2] Purdy v. Doyle, 1 Paige, 558. Wilder v. Keeler, 3 id. 167.

[3] 1 Mad. Ch. Pr. 473. Fonb. Eq. pt. 2, ch. 2, § 1 and note.

[4] Moses v. Murgatroyd, 1 J. Ch. R. 130.

[5] Id. 119.

[6] Purdy v. Doyle, 1 Paige, 558. Wilder v. Keeler, 3 id. 167.

[7] Wilder v. Keeler, supra.

the usual decree for the payment of debts in a due course of administration, and *without preference to any*, meant without that preference which the personal representative or heir at law had a right to give to debts of a particular class over other debts of the same class, previous to the commencement of a suit against him. The Revised Statutes adopted the principle, that in the payment of judgments or decrees enrolled against the deceased, they should be paid according to the priority, as indicated by the date of the docket thereof. The common law order for the payment of debts was altered and a rule adopted analogous to that prevailing in equity previous to that time, except in the preference given to judgments and decrees against the deceased. The whole rule divides the debts of the deceased into four classes, and directs the executor or administrator to pay the same according to the following order of classes: 1. Debts entitled to a preference, under the laws of the United States. 2. Taxes assessed upon the estate of the deceased, previous to his death. 3. Judgments docketed, and decrees enrolled, against the deceased, according to the priority thereof, respectively. 4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.[1] And it is expressly enacted,[2] that no preference shall be given in the payment of any debt over other debts of the same class, except those specified in the third class; nor shall a debt due and payable be entitled to preference over debts not due; nor shall the commencement of a suit for the recovery of any debt, or the obtaining a judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class. Debts not due, may be paid by an executor or administrator, according to the class to which they belong, after deducting a rebate of legal interest upon the sum paid, for the time unexpired. These and other statutory regulations on the same subject, removed the temptation which formerly existed, to prosecute the executors or administrators as soon as possible after the granting to them of letters testamentary or of administration. And the equitable principle thus adopted, which placed creditors by simple contract upon the footing of those by specialty, have rendered applications to equity for the purpose of marshaling assets, less frequent and less necessary.

In the ordinary administration of real and personal property, for the payment of debts, which have no lien upon any portion of the estate, the assets are applied in the following order: 1. The personal estate, not specifically bequeathed or plainly exempted from the payment of debts by some provision in the will of the testator. 2. Lands expressly devised

[1] 2 R. S. 87, § 27. [2] Id § 28.

for the payment of debts, not merely charged, but devised or ordered to be sold. 3. Descended estates. 4. Lands charged with the payment of debts.[1]

In cases where the next of kin, legatees, heirs and devisees are liable for the debts of their ancestor, the same order of preference is preserved as is prescribed for the government of executors and administrators.[2] Descended estates, therefore, are equally liable to the payment of the *simple* contracts of the ancestor, as his specialties.

The personal estate is the primary fund for the payment of debts, and is to be first resorted to, though the debts be charged also on the real estate.[3] This is the natural fund, both for the payment of debts and legacies, and the testator is presumed to act upon this doctrine, until he shows some other distinct and unequivocal intention.[4] Where the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies, notwithstanding such legacies, by the terms of the will, are expressly charged upon the persons to whom the real estate is devised. The charge upon the devisees in such a case will be deemed in aid, and not in exoneration of the primary fund.[5]

The residuary personal estate is more particularly the primary fund for the payment of the testator's debts, where no other provision is made.[6]

But the testator may charge his real estate with the payment of his debts, in exoneration of his personal property. In such case, should the debt be collected by the creditor out of the personal estate of the deceased, or out of the real estate descended to his heirs at law, the legatees of the personalty, or the heirs at law of the real estate, whose property has been thus applied, will be entitled to be subrogated to the rights of the creditors as against the primary fund. To avoid circuity of action, therefore, a court of equity permits, and sometimes requires, a creditor, who has two funds to resort to for the payment of his debt, to proceed at once against the primary fund; without subjecting the owners of the secondary fund to useless litigation.[7] Where the testator, therefore, has charged his real estate, or any part of it, with the payment of his debts, in exoneration of his personalty, the creditors may come at once into a

[1] Livingston v. Newkirk, 3 J. Ch. R. 312, 325. Donne v. Lewis, 2 Bro. C. C. 257, 263. 1 id. 528. Manning v. Spooner, 3 Ves. jr. 114.

[2] 2 R. S. 453, § 37.

[3] McKay v. Green, 3 J. Ch. R. 56.

[4] Hoes v. Van Hoesen, 1 Barb. Ch. R. 379; affirmed on appeal, 1 Comst. 121.

[5] Id.

[6] Smith v. Wyckoff, 11 Paige, 49 Hawley v. James, 5 Paige, 318.

[7] Smith v. Wyckoff, 11 Paige, 57.

court of equity to obtain satisfaction of such debts out of the primary fund; although they may have a perfect remedy at law against the personal estate in the hands of the executors.[1]

But the usual clause in a will, devising all the rest of the testator's real and personal estate not before devised, for the payment of debts, is not sufficient to show an intention to charge the real estate; nor is a direction that all debts and legacies are to be paid. But if the real estate be devised, "after payment of debts and legacies," it is charged with them.[2] So also where the testator devises the real estate, after a direction that debts and legacies *be first paid*, the real estate has been held to be well charged.[3]

In marshaling the assets, the estate *descended* to the heirs is to be applied to the payment of debts, before the estate *devised*, unless the latter be devised specially to pay debts.[4] The heir is not entitled to contribution from the devisees, toward the satisfaction of the creditors of the testator; nor does equity help a pecuniary legatee to throw a debt against the personal estate upon a devisee of land.[5] Equity will even marshal the real assets *descended* to the heir, in favor of, or for the relief of specific legatees, but it will not, for such a purpose, interfere with the lands *devised*, unless they were devised subject to the payment of debts.[6]

Where there are different devisees, in respect to a charge, to which their lands are equally bound by the will, they must contribute, on a deficiency of assets, in proportion to the value of their respective interests; as to pay an annuity to the widow of the testator, or debts remaining unsatisfied after the personal, and all the real estate not devised, has been exhausted.[7]

As between heirs and devisees, the land which is undisposed of by the will, is primarily liable for the payment of the testator's debts, when the personal estate is insufficient for that purpose.[8]

Equity will apply personal property of the testator, which is subsequently acquired, in favor of a devisee of the realty, where lands have been taken by operation of law, to pay the debts of the deceased, in case

[1] Smith v. Wyckoff, 11 Paige, 57.

[2] Lupton v. Lupton, 2 J. Ch. R. 614. Tompkins v. Tompkins, Prec. in Ch. 397. Shallcross v. Finden, 3 Ves. 738.

[3] Holt v. Vernon, Prec. in Ch. 430. Williams v. Chitty, 3 Ves. 545.

[4] Livingston v. Livingston, 3 J. Ch. R. 148.

[5] Livingston v. Livingston, 3 J. Ch. R. 148.

[6] Id. Hanby v. Roberts, Ambl. 128. Clifton v. Burt, 1 P. Wms. 678. Haslewood v. Pope, 3 P. Wms. 322, 5th Res'n.

[7] Livingston v. Livingston, 3 J. Ch. R. 148.

[8] Graham v. Dickinson, 3 Barb. Ch. R. 169.

where such lands were not charged with the payment of debts, and where, consequently, the personal estate was the primary fund for that purpose. Thus, where a testator charged his personal estate with the payment of his debts, but it being insufficient for that purpose, his executors applied to the surrogate for, and obtained an order for the sale of his real estate in the possession of the devisees, which was sold accordingly, and the proceeds applied to the payment of the debts of the testator: and subsequently the commissioners, under the treaty with France, awarded to the executors a sum of money, upon a claim which their testator had against the French government at the time of his death; which sum they received for the benefit of the estate; it was held that the sum of money thus received upon the French claim was, in equity, to be considered as a substitute for the real estate sold for the payment of debts primarily chargeable upon the testator's personal property, and that it belonged to those who were the devisees, or the owners of the land thus sold, at the time of the sale.[1]

In cases where the real property has thus been taken for the payment of the debts of the deceased, and personal property which ought to have been primarily appropriated to that purpose is discovered, the question has arisen whether the personal property, to which the owner of the realty has by such sale become entitled, shall be distributed to his representatives, in case of his death before the application, as real or personal estate. This question may assume an importance when the heirs at law or devisees are a different class of persons from the persons entitled to succeed to the personal estate under the statute of distribution. Though the fund thus received is a substitute for the real estate thus taken for the payment of debts, still it is not real property, but a remuneration for the loss of real property. As the real and personal representatives are alike volunteers, there is nothing to take the case out of the general rule, that they must take their estate of the intestate as they find it, and it was so held by the chancellor in Graham v. Dickinson, (supra.)

So also, if a judgment debtor should die, leaving personal property sufficient to pay his debts, and the sheriff, having advertised the real estate of the deceased for sale previous to his death, should afterwards proceed and sell the same, after it had become the real estate of the heir at law, the latter would be entitled to be subrogated to the rights of the judgment creditors as against the personal estate which was primarily liable for the payment of such debts.[2]

[1] Graham v. Dickinson, 3 Barb. Ch. R. 169.

[2] Per Walworth, Ch., in Graham v. Dickinson, 3 Barb. Ch. R. 183. Smith v. Kearney, 2 id. 551.

In equity, land contracted for, descends to the heir at law as real estate, and if the purchase money is unpaid, the heirs, as between them and the personal representatives, can require the latter to discharge the debt from the personal estate.[1]

The same rule originally prevailed where the owners of real estate gave a bond and mortgage for his own debt, in which case on his death, as between the heirs and the personal representatives, the personal property was the primary fund, and the heirs could require the executors or administrators to pay off the mortgage out of the personal estate.[2] The bond was treated as the principal, and the mortgage as the security; and as the personal property has been shown to be the primary fund for the payment of debts, it necessarily followed that the heir, in the absence of any special directions in the will to the contrary, could require the representatives of the personalty to remove the incumbrance. But this rule has been abrogated by the Revised Statutes, which have established the following rule: Whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.[3] The effect of this provision is to make the land, in such a case, the primary fund for the payment of the mortgage debt, instead of the personal estate, when the will is silent on the subject.[4] And this provision includes a mortgage debt assumed by the testator on purchasing a part of previously mortgaged premises, as constituting an equitable mortgage of the part purchased;[5] and it extends to intestates' estates, as well as to estates wholly or in part disposed of by will.[6]

The mortgage creditor is entitled to full satisfaction of his debt, out of the estate of the deceased, if there be enough for that purpose. But he must first resort to the estate mortgaged, which as to him is the primary fund, and is entitled to come in *pro rata* with other creditors against the personal estate, only for so much of his debt as cannot be realized from the land.[7]

[1] Champion v. Brown, 6 J. Ch. R. 402. Johnson v. Corbett, 11 Paige, 272. Livingston v. Newkirk, 3 J. Ch. R. 312.

[2] Mollan v. Griffith, 3 Paige, 404. King v. King, 3 P. Wms. 358. Cumberland v. Codrington, 3 J. Ch. R. 257. Lanoy v. Athol, 2 Atk. 444.

[3] 1 R. S. 749, § 4.

[4] Johnson v. Corbett, 11 Paige, 265.

[5] Halsey v. Reed, 9 Paige, 449.

[6] House v. House, 10 Paige, 158.

[7] Halsey v. Reed, 9 Paige, 446. Johnson v. Corbett, 11 id. 265.

Upon the principle that the estate mortgaged is the primary fund for satisfying the mortgage, if the mortgagee delay to foreclose, for the accommodation of the heirs, and the land fall in value, the deficiency occasioned by such delay is not chargeable against the administrators, who have applied the whole personal property to the payment of other debts. But must be borne by the creditor, unless he can be reimbursed out of other lands belonging to the heir.[1]

The intention of the testator, if consistent with the rules of law, will always be carried out, as far as practicable, in the disposition of his estates. He may make by his will, real estate, or a particular portion of it, the primary fund, both for the payment of debts and legacies; and the land may become the primary fund for the payment of specific or general liens, by the contract of the purchaser.[2] Should the vendee of a piece of land stipulate to pay as a part of the purchase money, a judgment, which was also a lien upon other lands, there can be no doubt that the land so purchased becomes the primary fund for the payment of the same as between the judgment creditor and the owners of other real estate, and as between him and the personal representatives of the judgment debtor. So, where there is a specific lien on the land devised, as in the case of a mortgage, or where the land is devised on condition of the payment of debts, or the debts are directed to be paid out of the estate devised, and where it appears from the will, that it was obviously the intention of the testator that the legacy should be received entire, and the debts paid out of other funds, the court will marshal the property in such a manner as to carry that intention into effect.[3]

If the testator specifically bequeaths his chattels to one person, and devises his real estate to another, without any directions as to which property shall be appropriated to satisfy an existing judgment against him, the personal property must be first applied to that object.[4]

Where the testator subjects his real estate to the payment of all his debts, and a creditor is satisfied out of the personal estate, so as to leave no fund for the payment of legacies, equity will marshal the assets in favor of the legatees, and permit them to stand in place of the creditors with respect to the real estate.[5]

In like manner, where one or more legacies are charged on the real

[1] Johnson v. Corbett, 11 Paige, 272.

[2] Cumberland v. Codrington, 3 J. Ch. R. 229.

[3] Rogers v. Rogers, 1 Paige, 190.

[4] Rogers v. Rogers, 1 Paige, 188; affirmed, 3 Wend. 503.

[5] Haslewood v. Pope, 3 P. Wms. 323.

estate, another legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real estate.[1]

The principle on which assets are marshaled in favor of legatees assumes that all the legacies are valid, and might, if so directed by the testator, be paid out of either fund. Hence if one of the legacies be void as to the real estate, as in the case of a charitable bequest, equity will not marshal assets in its favor, so as to give it effect out of the personal estate. This would be to do indirectly what could not be done directly.[2]

In concluding this topic, it may be added, that courts of equity do not confine themselves to the remedy against the executors or administrators, who violate their trusts, but will hold all persons accountable, who aid and assist the executors and administrators, with a knowledge of their misconduct, in misapplying the assets. Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of his duty, is to be adjudged as conniving with the executor to work a devastavit, and is accountable to the person injured, by such disposition directly, on a bill filed by him.[3] Whenever there is a misapplication of the assets, and they can be traced into the hands of a party affected with notice of such misapplication, the trust will attach upon the property or its proceeds in the hands of such person, whatever may have been the extent of such conversion or misapplication.[4]

SECTION XV.

OF CHARITIES.

THE doctrine of charities, and of charitable uses, is comprised in the law of trusts, as administered by courts of equity, and forms an important branch of equity jurisprudence. In its widest extent, the word charity denotes all the good affections which men ought to bear to each other; in its most restricted sense, it imports relief to the poor. In neither of these senses is it employed in chancery.[5]

[1] Att'y Gen. v. Tyndall, Ambl. 614. Foster v. Blagden, id. 704. Mogg v. Hodges, 2 Ves. sen. 52. Hilliard v. Taylor, Ambl. 713.

[2] Bonner v. Bonner, 13 Ves. 379. Bligh v. Lord Darnley, 2 P. Wms. 620. Masters v. Masters, 1 id. 421. 423.

[3] Colt v. Lasnier, 9 Cowen, 320. Keane v. Roberts, 4 Mad. R. 357, 358.

[4] Gilchrist v. Stevenson, 9 Barb. S. C. R. 9. Adair v. Shaw, 1 Sch. & Lefr. 261, 262.

[5] Morice v. Bishop of Durham, 9 Ves. 405.

On one occasion Lord Camden said, that a gift to a general public use which extends to the rich as well as the poor, falls under the definition of a charity.[1] And in general it may be said that, in England, since the 43 Elizabeth, ch. 4 the courts of that country, when the question has been whether a particular gift, devise or bequest could be upheld as a charity, have referred to that statute, as containing an enumeration of the cases which fall within the scope of the term. A charity may be created by any conveyance competent to pass the title to property, though questions of this kind most frequently arise upon wills.[2]

The statute of 43 Eliz. ch. 4, contains internal evidence that the jurisdiction of the court over charities was then firmly established, and that the statute was not intended to introduce any new subject of jurisdiction. Its object was to prescribe a less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently in force.[3] It enacts that the commissioners shall inquire of the following uses as good and charitable, viz: For relief of aged, and impotent or poor people; for maintenance of sick and maimed soldiers, schools of learning, free schools, scholars in universities, houses of correction; for repairs of bridges, of ports and havens, of causeways, of churches, of sea banks, of highways; for education and preferment of orphans, for marriage of poor maids, for support and help of young tradesmen, of handicraftsmen, of persons decayed; for redemption or relief of prisoners or captives, for care and aid of poor inhabitants, concerning payment of fifteenths, setting out of soldiers, and other taxes;[4] other gifts, provisions and limitations which, though not within the letter, have been held to be within the purview of the statute, as money to maintain a preaching minister,[5] or to a protestant dissenting chapel.[6] So for the building of a session house for a city or county, the making of a new or repair of an old pulpit in a church, or the buying of a pulpit cloth or pulpit cushion, or the setting up of new bells where none are, or amending them when they are out of order.[7] So a devise of money to a minister to preach an annual sermon, and keep a tomb-stone and inscription in repair, and to a corporation for keeping accounts thereof, is a charitable use.[8]

On one occasion, Marshall, Ch. J., intimated that charitable bequests,

[1] Jones v. Williams, Ambl. 652. Williams v. Williams, court of appeals, N. Y. 1853.

[3] Per Jones, Ch., 9 Cowen, 476, 477.

[4] 2 Fonb. B. 2, pt. 2, ch. 1, § 2, note b. Note w to Porter's case, 1 Co. 26. Bac. Abr. tit. Charitable Uses and Mortmain, C.

[5] Att'y Gen. v. Newcomb, 14 Ves. 1.

[6] Att'y Gen. v. Fowler, 15 Ves. 85.

[7] Duke's Charitable Uses, 109. 2 Fonb B. 2, pt. 2, ch. 1, § 2, note.

[8] Id

where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, enforcing the prerogative of the king, as *parens patriæ*, independently of the statute of 43 Elizabeth.[1] But this doctrine was denied by Chancellor Walworth,[2] and was shown by the supreme court of the United States to be wrong in a subsequent case.[3] It has been conclusively proved that the court of chancery exercised jurisdiction over charities anterior to the statute of Elizabeth, and upon the common law.[4]

The other provisions of the statute 43 Elizabeth, ch. 4, show that they were not introductory of a new jurisdiction, but were designed to regulate one already and for a long time in being. Thus, the statute, after enumerating the species of property which had been devoted to charity, and describing the charities which had been upheld, as above mentioned, and adverting to the fact that the property thus devoted to charity had not been employed according to the charitable intent of the giver, enacts, for remedy thereof, that the lord chancellor and the chancellor of the duchy of Lancaster should be authorized to issue commissions into the several dioceses, directed to the bishop and his chancellor and others, to inquire by a jury as to such gifts as are before enumerated, and the abuses of them, and to make orders, decrees and judgments for the employment of the property for the purposes for which it was given; which orders are to be certified into the court of chancery, there to be executed, until altered by the lord chancellor upon complaint of the party aggrieved. The second and third sections, except the colleges within the universities, and certain municipal corporations, and corporations having visitors appointed by the founders, from the operation of the act. The fourth section preserves the jurisdiction of the ordinary. The fifth forbids any party interested from being named as a commissioner. The sixth saves the rights of purchasers for a valuable consideration, without notice or fraud, of property given to a charity, from the jurisdiction of the commissioners; but authorizes orders for recompense to be made against those who are guilty of a breach of trust. The seventh exempts from the jurisdiction of the commissioners, grants made to the sovereign during the three preceding reigns. The

[1] Baptist Association v. Hart, 4 Wheat. 39.

[2] Potter v. Chapin, 6 Paige, 649.

[3] Vidal v. Girard's Ex'rs, 2 How. 196.

[4] Id. Williams v. Williams, MS., court of appeals, per Denio. Porter's case, 1 Co. 26. McCartee v. The Orphan Asylum, 437, 476, per Jones, Ch. Executors of Burr v. Smith, 7 Vt. 241. Vidal v. Girard's Ex'rs, 2 How. 127. Story's Eq. § 1136 et seq. Kniskern v. The Lutheran Churches, 1 Sandf. Ch. R. 562, where most of the cases are collected.

eighth and ninth sections provide for certifying the acts of the commissioners into the court of chancery, and for their execution by the orders of the lord chancellor. The tenth and last sections allow parties aggrieved by the orders of the commissioners to complain to the lord chancellor, who is authorized to annul, alter or enlarge the decrees of the commissioners, and to tax costs against such as shall complain without cause.[1]

The structure of these enactments shows that they had reference to an existing system; and the authorities cited under the preceding head justify the opinion expressed by the learned judge who delivered the opinion of the court of appeals in this state, in Williams v. Williams, that the law of charities was, at an indefinite but early period in English judicial history, engrafted upon the common law; that its general maxims were derived from the civil law, as modified in the later periods of the empire by the ecclesiastical element introduced with Christianity, and that the statute in question introduced no new principles, but was designed to afford a new and less dilatory mode of establishing charitable donations, and to correct other abuses in relation to them.[2]

Even in England, at the present day, proceedings to establish charities are not, as Chief Justice Marshall supposed, in The Baptist Association v. Hart, (supra,) under the statute of Elizabeth. An able writer on the subject, whose views were adopted by the court of appeals in Williams v. Williams, (supra,) says: "Commissions under this statute (43 Eliz.) have long fallen into disuse, partly by their abuse, and partly because they were found insufficient for prosecuting the claims in many instances; and in others, because they were extremely unjust towards the persons who were called upon to account for property, and sought to be charged, and because they generally ended in the court of chancery. The general proceeding, therefore, in the case of charities, has been for many years past, by *the old mode of information*, in the name of the attorney general, who brings the matter in question formally upon record, stating the claims that were made upon the individuals charged with a breach of trust, calling upon them to make a defense, and putting their defense upon record, and then having a complete issue upon the record, upon which the judgment of the court of chancery can be founded."[3] The whole object of the statute of Elizabeth, says the learned judge in Williams v. Williams, (supra,) seems to have been to provide the form of a remedy against the abuse of charities

[1] See statute at length in Vin. Abr. tit. Charitable Uses, A., and 2 Stat. at Large, 708. Williams v. Williams, opinion of Denio, J. supra.

[2] Id. and per Jones, Ch. in McCartee v. Orphan Asylum, 9 Cowen, 470 et seq.

[3] Shelford, 278.

That form has long since been abandoned, and relief in that class of cases is now sought under the ordinary forms of justice in use in the court of chancery. The present English doctrine of charities does not therefore depend upon the statute, so far as the course of proceeding is concerned, for nothing could be more dissimilar than the two modes. It cannot be said that the existence of charitable gifts originated in the statute, for the preamble shows, that the object in passing it was to reach gifts already in existence, to redress breaches of trust, which had been committed by the trustees, under donations theretofore made.

Neither the statute of charitable uses, (43 Eliz.) nor the act of 9 Geo. 2, ch. 36, restraining gifts to charitable uses, under certain circumstances, was ever re-enacted in this state; but on the contrary, the legislature for greater caution, at an early period of the revolutionary war, enacted that from and after the first day of May, 1788, none of the statutes of England, or of Great Britain, should operate or be considered as laws of this state.[1] It is believed, however, that neither of those laws was ever in force in this state.[2]

The constitution of 1777 adopted, as the law of this state, amongst other things, such parts of the common law of England, and of the statute law of England and Great Britain, as together did form the law of the colony of New-York on the 19th April, 1775, subject to such alterations and provisions as the legislature should, from time to time, make concerning the same.[3] And the same feature has been preserved in the constitutions of 1821 and 1846. Having thus adopted the common law of England, so far as it was applicable to our circumstances, and conformable to our institutions, the law of charitable uses is in force here, unless, *first*, it was established by an English statute which has been abrogated; or *secondly*, unless there is something in the system repugnant to our form of government; or *thirdly*, unless it can be shown, by the history of our colonial jurisprudence, that it was not in force here prior to the

[1] 2 Greenl. 116, L. of 1788, ch. 46, § 37.

[2] A contrary opinion is expressed by Duer, J. in Ayers v. The Meth. Church, 3 Sandf. S. C. R. 367. But I think the fair inference from the opinion of Judge Denio, in Williams v. Williams, is according to the text; and the law is thus laid down by Jones, Ch. in McCartee v. The Orphan Asylum, 9 Cowen, 452, in support of his decree. His opinion, in this respect, was not disputed. And to the same effect are Dutch Church v. Mott, 7 Paige, 77; Robertson v. Bullions, 9 Barb. 98, 99.

In Massachusetts, it has been held that the statute of 43 Eliz. ch. 4, is in force in that state. Sanderson v. White, 18 Pick. 328. And it was said by Williams, Ch. J., in Burr's case, to have been in force in Vermont.

See the general act for the incorporation of Charitable Societies, Law of 1848 p. 447.

[3] Const. 1777, § 35

revolution; or *lastly*, unless it has been abolished by the Revised Statutes.[1]

The cases already cited are sufficient to show that the law of charitable uses was a part of the common law of England long previous to the 19th of April, 1775; and there was no legislation, in the time of our colonial subjection to the mother country, affecting the question. We have no reports of the decisions of the courts prior to the revolution; and can learn the state of the common law, at that period, only from the decisions of the British courts, from the records of the colonial courts, and from tradition.

We are not without evidence of undisputed authenticity, that the English doctrine of charities was considered in force in the colony of New-York prior to the revolution. In a manuscript volume of the orders of the court of chancery, under the colonial government, which is preserved in the office of the clerk of the court of appeals, there is found a record of the proceedings in a case determined in that court, held before the governor and council, in the year 1708, which bears directly upon the question. The attorney general filed an information against William Cullin, to compel the payment of seventy-five pounds, bequeathed by one Nicholas Cullin for the benefit of the poor of New-York and Albany, which was directed to be distributed by certain trustees named in the will, fifty pounds among the poor people in New-York, and twenty-five pounds to those in Albany. The bill of complaint alleged that the defendant, under a power of attorney from the executor in England, had possessed himself of the testator's estate in the colony, "out of which according to equity he ought to have paid the legacies aforesaid, *forasmuch as the said legacies were given to pious and charitable uses.*" "And as the preservation of charitable uses is of great public benefit, and great concern to our lady the queen, and the poor aforesaid, in consideration whereof," the attorney general prayed that the defendant might answer and be decreed to pay the amount, &c. The defendant answered, and the cause being heard upon the pleadings, a decree was made that he should pay to the trustees the amount of the legacies to be distributed to the poor, according to the will of the testator.[2]

It is not probable that many cases occurred in the colony, which called

[1] Const. 1821, art. 7, § 13. Const. 1846, art. 1, § 17. Williams v. Williams, per Denio, J. Bogardus v. Trinity Church, 4 Paige, 198. Canal Com. v. The People, 5 Wend. 445. Att'y Gen. v. Stewart, 2 Meriv. 162. Ayers v. The Meth. Church, 3 Sandf. S. C. R. 368.

[2] Att'y Gen. v. Cullin, cited by Denio, J. in Williams v. Williams, supra.

for the application of the doctrine of charitable uses. The case of The Att'y Gen. v. Cullin, (supra,) is exactly in point to show the existence of the doctrine at a very early period. We have traditional evidence that such was the law of the colony at the time of the revolution, from the opinions of Chancellors Kent and Jones, on several occasions, both of whom were on the stage early enough to be familiar with the opinions of the learned judges and lawyers who flourished in the colony previous to the 19th of April, 1775. The father of Chancellor Jones was one of the most eminent lawyers of that day, and one of the commissioners by whom the statutes were first revised after the close of the revolutionary war. There is decisive evidence that both those learned chancellors treated the law of charitable uses as a part of the common law of this state.[1]

There is nothing in the law relative to charitable uses which is repugnant to our form of government. The administration of justice, in this or any other country, would be strangely defective, if there was no power to uphold the disposition of property for charitable uses.[2] And it has been settled by the highest court of the state, that the Revised Statutes have not abrogated the common law in this respect.[3]

With regard to the persons who may take property devised or bequeathed for charitable uses, there is a distinction arising from the nature of the property, whether it be real or personal. In this state, and probably in most other states, corporations are excepted out of the statute of wills.[4] The Revised Statutes now in force, provide that every estate and interest in real property, descendible to heirs, may be devised; and such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.[5] It was settled by the court of errors, in McCartee v. The Orphan Asylum, (supra,) that the former statute of wills did not authorize a devise of real estate directly to a corporation. Had the devise in that case been to the executors in trust for the corporation, it seems to have been conceded that it could have been upheld as a charitable use.[6] Chancellor Walworth, in a later case, but one arising before the Revised Statutes, held that a pecuniary legacy to a corporation, payable out of the proceeds of real estate which the executors were directed to sell, was valid, although the corporation was not authorized by its charter to take real

[1] 2 Kent's Com. 285, 288 and notes. McCartee v. Orphan Asylum, 9 Cowen, 469 et seq. per Jones, Ch. in giving his opinion.

[2] 2 Kent's Com. 285.

[3] Williams v. Williams, supra.

[4] 1 R. L. 364. 2 R. S. 57, § 4.

[5] 2 R. S. 57, §§ 2, 3

[6] 9 Cowen, 444, &c.

estate by devise. And he intimated a doubt whether such legacy could under the provisions of the Revised Statutes, be supported; and he expressed the opinion, that a devise of real property in trust for a corporation was void, under those statutes, unless such corporation was expressly authorized by its charter, or by statute, to take by devise.[1]

The general act for the incorporation of benevolent, charitable, scientific and missionary societies, passed April 12, 1848, (L. p. 447,) contains this section: "§ 6. Any corporation formed under this act, shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife or child, or parent, shall devise or bequeath to such institution or corporation, more than one fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one fourth; and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator." This provision was made to guard against improvident testamentary dispositions of property by persons *in extremis*, in derogation of the claims of near relatives.

It has been asserted by a learned court that a pious use cannot be sustained by a court of justice, unless in a country where the truths of religion have been settled and defined by law, or judges have a discretionary power to determine and declare them. "Under a constitution," said the learned judge, "which extends the same protection to every religion and to every form and sect of religion, which establishes none and gives no preference to any, there is no possible standard by which the validity of a use as pious can be determined; there are no possible means by which judges can be enabled to discriminate, between such uses as tend to promote the best interests of society by spreading the knowledge and inculcating the practice of true religion, and those which can have no other effect than to foster the growth of pernicious errors, to give a dangerous permanence to the reveries of a wild fanaticism, or encourage and perpetuate the observance of a corrupt and degrading superstition."[2] The same learned court, while admitting that christianity is in a modified sense a part of the common law, so far at least, that the law will not permit the essential truths of revealed religion to be ridiculed and reviled; in other words, that blasphemy is an indictable offense at common law,

[1] The Theological Seminary of Auburn v. Childs, 4 Paige, 419.

[2] Andrew v. N. Y. Bible and Prayer Book Society, 4 Sandf. S. C. R. 181.

denied that it is a municipal law in the proper sense of the term. And insisted that, if in such sense it was a part of the common law, every person is liable to be punished by the civil power, who refuses to embrace its doctrines and follow its principles.[1]

This reasoning, though entitled to high respect from the source from which it emanated, was not deemed conclusive by the court of appeals. On the contrary, the latter court held that the consideration that a religious establishment was forbidden by our constitution, and that all preferences among religious denominations were prohibited, did not require the abolition of the law of charity. Although christianity is not the religion of the state, considered as a political corporation, it is nevertheless closely interwoven into the texture of society, and is intimately connected with all our social habits, customs and modes of life.[2]

Nor does the upholding a charity in favor of a particular denomination of christians, affirm the truth of the principles by which that sect is distinguished from others. A bequest to support a preacher of the gospel, by a Baptist elder, does not, if sustained by the court, affirm that the notions of christian baptism, entertained by that denomination, are exclusively orthodox. The constitution of the United States, as amended, merely forbids congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof;[3] and the constitution of this state, in like manner, allows the free exercise and enjoyment of religious profession and worship, without discrimination or preference, to all mankind; and forbids that any person should be rendered incompetent as a witness, on account of his opinions on matters of religion; but provides that the liberty of conscience thereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.[4] The only limit to toleration is at the point where licentiousness, or practices inconsistent with the peace or safety of the state, commence; and it is the province of the courts to determine, incidentally indeed, but no less decisively, when that point has been reached.

The upholding of a charity in favor of a religious denomination merely affirms that its doctrines are not licentious in their tendency, and that the practice of them is not inconsistent with the peace and safety of the

[1] Andrew v. N. Y. Bible and Prayer Book Society, 4 Sandf. S. C. R. 182. Ayers v. The Meth. Episcopal Church, 3 Sandf. S. C. R. 351. Yates v. Yates, 9 Barb. 339.

[2] Williams v. Williams, supra.

[3] Amend. to U. S. Const. art. 1.

[4] Const. of 1846, art. 1, § 3.

state A court of justice is as capable of determining these questions, without infringing the right of conscience, as it is to pass on any other question of right secured by the constitution.[1] The liberty of speech and of the press is maintained by the same instrument which secures the liberty of conscience. The party who exercises the right is made responsible for its abuse. The tribunal that fails to punish a publication as libellous, does not necessarily approve of the matters complained of as injurious; because, though the libel be of a public nature and the subject of an indictment, the punishment of it may not be called for by any principles of justice or public policy. It may be of that kind that it may be safely tolerated, *while reason is left free to combat it.* A charity in favor of a sect, whose doctrines tend to licentiousness, or lead to the violation of the laws of the land, cannot be upheld. Donations, for example, to aid in propagating the doctrines of Mahometanism, or Mormonism, could not be supported, because, amongst other things, they countenance polygamy, in hostility to the settled policy and laws of the land. "A trust for the circulation of the monstrous fables of the Talmud, or the gross impostures of the Koran,"[2] does not, it is believed, stand upon the same footing as a trust for the distribution of the Book of Common Prayer of the Protestant Episcopal Church.[3] Though the support of the last does not necessarily imply a belief in all the tenets of that church, it does affirm that its doctrines neither lead to licentiousness or put at hazard the peace or safety of the state. The support of the former could not be justified without overruling and subverting the social relations which we have derived from christianity, and repealing our statute against a plurality of wives.

A slight glance at our system of laws, will show how deeply they are imbued with the spirit of the christian religion. Even the common maxim, so to use our own as not to injure another's right, is of a higher origin than the Roman law. The recognition of the sabbath, the mode of administering oaths, the punishment of the crimes of bigamy, of adultery, and in some cases, of fornication; the rules of descent and distribution of the property of intestates; the domestic arrangement of families, and the liability of the parents and of the children of adequate ability to support each other; all show the pervading influence of christianity in shaping our institutions.

[1] Terrett v. Taylor, 9 Cranch, 43.

[2] Andrew v. N. Y. Bible and P. B. S. 4 Sandf. S. C. R. 184.

[3] Id. per Duer, J. This case was reversed by the court of appeals, in Dec 1853, as will be noticed hereafter.

In additon to these features in our legal polity, as was well remarked by the learned judge in Williams v. Williams, the provision for creating religious corporations, recognizes the duty of the government to provide facilities for the voluntary establishment of public worship. A legally organized system for protecting and preserving gifts and donations in aid of christian charity, falls within the same principle and is equally unobjectionable. The establishment of corporations for colleges, academies and other seminaries of learning, belongs to the same principle. Though these incorporations may and doubtless do, to a great extent, render the doctrine in relation to public charities less important, they nevertheless show that the objects sought to be attained by the doctrine, are highly regarded by our people. And when it is considered that we find in the common law of England, which we have to a limited extent adopted by our constitution, certain principles already established respecting conveyances to charity, no reason is perceived, growing out of the absence of a state religion, for holding that they are inapplicable to our condition.[1]

It has been seen, in our discussions under other heads, that equity often interferes and sets aside agreements, the execution of which would be *contra bonos mores*, as well as such as are forbidden by statute. Our courts of equity, in administering this branch of the law, have never felt embarrassed by the fact that we have no religion established by law. They have been able to find a standard, by which to determine whether a particular transaction was against public morals, by a reference to the general sense of the community. The enlightened conscience of individuals constitutes the conscience of the state. We live in a christian, and not a pagan land, and the truths of christianity can as well be learnt from the original sources of its doctrines, and its principles as well obeyed, as if both were prescribed by a public statute. On the great question of public morals and christian duty, there is little diversity of opinion, and none that interferes with an enlightened administration of justice.

The objection sometimes raised to the exercise of jurisdiction over charities, founded on the difficulty of the questions they involve, proves too much. If it be well founded in this case, no reason is perceived why it should not apply to all cases; the consequence of which would be, that every complicated case would be left without redress.

The foregoing observations show that the doctrine of charities, in this country, is in substance the same as it is in England, in that class of cases in which it can be administered by the courts, without the aid of

[1] Williams v. Williams, supra.

the sign manual of the king. If the gift be so indefinite that it cannot be executed by the court, or if its purpose be illegal or impossible, the claim of the personal representatives or heirs of the donor must, in general, prevail over the charity. The reason is, that we have no magistrate clothed with the prerogatives of the crown, and our courts of justice are intrusted only with judicial authority. The cases, therefore, which in England vest the right in the king as *parens patriæ*, cannot be executed here, but by act of the legislature.[1] Whenever any thing is given to charity and no charity appointed, or if the charity which is appointed be superstitious, the power of appointment, in England, vests in the king;[2] and with us such legacies would be ineffectual, and the claim of the heirs or parties in distribution would prevail over the charity, unless, indeed, the legislature should interfere. The general doctrine was stated by Lord Eldon, on one occasion, as the result of all the authorities, which he fully reviewed, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual; but where the execution is to be by trustee, with general or some objects pointed out, there the court will take the administration of the trust.[3] The latter and not the former class, of cases is applicable to our condition, and alone forms a part of our *judicial* system;[4] though the legislature may probably interfere, as will be shown.

It is a general principle, which has already been adverted to in this chapter, that equity never suffers a trust to fail for the want of a trustee. This principle is, in an especial manner, applicable to charities.[5] Indeed, it is not charity, within the meaning of the law of charitable uses, to give to a friend. The thing given, it has well been said, becomes a charity, where the *uncertainty* of the recipients begins.[6]

Where gifts or devises are made to trustees capable of taking the legal estate in trust, for pious or charitable uses, no question can arise as to the validity of the trust at common law, as a pious and charitable use, where the trust is definite in its objects; as where the gift or devise is in

[1] Williams v. Williams, supra. Ayers v. The Meth. Epis. Church, 3 Sandf. S. C. R. 351. Andrew v. N. Y. Bible and P. B. S. 4 id. 178.

[2] 2 Fonb. Eq. B. 2, pt. 2, ch. 1, § 3. Att'y Gen. v. Siderfin, 1 Vern. 224. Att'y Gen. v. Guise, 2 id. 266. De Costa v. De Pas, Ambl. 228. Mills v. Freeman, 1 Meriv. 55. Ambl. 712.

[3] Moggridge v. Thackwell, 7 Ves. 36; S. C. 1 Ves. jr. 464. Ommanney v. Butcher, 1 Turn. & Russ. 260, per Sir Wm. Grant.

[4] Williams v. Williams, supra.

[5] McCartee v. Orph. Asylum, 9 Cowen, 484, per Jones, Ch. Bartlett v. Nye, 4 Metc. 380.

[6] Fontain v. Ravenel, 3 Am. L. Reg. 269, per McLean, J.

trust for the support of the poor of a town; or for the benefit of an unincorporated missionary society; or for the support of the minister of a church and his successors in office; or for the maintenance of a school; or for the erection of a hospital.[1]

Thus, a conveyance made to certain individuals of the site of the Dutch church in Garden street, in the city of New-York, in 1691, in trust for the use of the ministers, elders and deacons of such church and their successors, and to have a house of public worship erected thereon, and for no other use whatever, was held to be a valid conveyance at the common law to a charitable and pious use; and the court of chancery had original jurisdiction to enforce the performance of the trust.[2] No violation of the trust upon which the property was conveyed, therefore, can have the effect to revest either the legal or equitable title to the property in the heirs of the original grantor. And the court will presume, after a great lapse of time, and the subsequent incorporation of the church, a conveyance from the original trustees or their heirs to the corporation.[3] So a pecuniary legacy to a town, for the purpose of erecting a town house for transacting town business, was held by Chancellor Kent to be valid as a charitable bequest The object was said to be for a general public use, as convenient for the poor as the rich.[4] A dedication of real or personal property depends upon the same principle; and the court of chancery will sustain a gift or bequest or dedication of personal property to public or charitable uses, if the same is not inconsistent with local law or public policy, and where the object of such gift or dedication is specific and capable of being carried into effect according to the intention of the donor.[5] Thus, where the inhabitants of a village, previous to the act for the organization of school districts, contributed by voluntary donations to a fund for the erection of a school house for the use of the neighborhood, and the school house was subsequently destroyed by the British troops, and congress afterwards passed an act to remunerate those whose property was thus destroyed; and previous to the passage of such act the village where such school house had been erected was incorporated into a school district, it was held that the fund afterwards received under that act belonged to such school district, and not to the original contributors to the fund. And the school district having been divided into two districts before the receipt of the money, from the United States; it was held, also, that the fund belonged to both

[1] Bac. Abr. tit. Charitable Uses, E. Att'y Gen. v. Clark, Ambl. 422. Jones v. Williams, id. 651.

[2] Dutch Church v. Mott, 7 Paige, 77.

[3] Id.

[4] Coggeshall v. Pelton, 7 J. Ch. R. 292.

[5] Potter v. Chapin, 6 Paige, 639.

districts in proportion to the taxable property in each at the time of the division.[1]

Where the beneficial use of property cannot take effect as a legal estate in the cestui que use, it will in some cases take effect as a trust, in the same manner as if the statute of uses had not passed; where it can take effect as a trust consistently with the rules of law. On this principle, though an unincorporated body cannot take the legal estate in premises as an executed use under the statute of uses, they may nevertheless take a beneficial interest in the property as a charitable use.[2]

Thus, where the owner of a lot of land, in April, 1790, in consideration of one hundred pounds, granted, bargained and sold the same unto Yates, Vrooman and six other persons named therein, and to their heirs and assigns forever; to have and to hold the same to the grantees and their heirs and assigns forever, upon trust, nevertheless to the only proper use, benefit and behoof of Van Dyck and twelve other persons named in the indenture, members of St. George's Lodge of free masons and all others who then were or thereafter might become members of such lodge, their survivors and successors forever, and for no other use, intent or purpose whatsoever. All the parties of the second part named in the deed, except Yates, and the whole thirteen persons specified by name therein as part of the then members of the lodge, having died, and the lot having been taken by a railroad company, for the use of their road, the damages were assessed, and the amount paid over to Yates, as the surviving grantee of the deed. Upon a bill filed by the heirs of the grantor in the deed against Yates, to recover from him the moneys thus received for the lot from the railroad company, it was held that it was not the intention of the parties to the deed to vest either the whole legal title, or the whole beneficial interest in the premises, in the thirteen persons therein specifically named as members of the lodge, during the terms of their respective lives, for their benefit, and the benefit of the survivor of them exclusively; but that it was the intention of the parties that it should operate as a conveyance of the legal title of the whole fee of the lot, not for the benefit of the thirteen individuals named, for life, with a resulting trust to the grantor, but for the aggregate body of the members who then constituted, or who should thereafter constitute, the St. George's Lodge.[3]

Where the gifts and devises for pious or charitable uses are not made to persons capaple of taking the legal estate, when made directly to a non-existing corporation; or to an unincorporated association, or to the

[1] Potter v. Chapin, 6 Paige, 639.

[2] Vander Volgen v. Yates, 3 Paige, 242, affirmed by court of appeals, Dec 1853.

[3] Id.

poor inhabitants of a town; or to the church wardens of a parish not incorporated, &c., they may be sustained at common law as pious or charitable uses, if the objects of the charity are defined or designated, and can be carried into effect according to the intent of the donor. This rule applies also to dedications.[1]

The questions with respect to the validity of a charity arise in a variety of ways. Sometimes on a bill by the attorney general to establish the charity, and sometimes by the heirs at law or parties entitled to distribution of the estate of the donor to set aside the will, legacy or devise, in their favor; and sometimes by parties claiming the legacy in trust for the purposes of the will. In the late case before the supreme court of the United States, the bill was filed by the heirs at law to set aside the will of the testator, for the invalidity of its provisions. The testator, a citizen of Louisiana, had made a will, in which, after bequeathing certain legacies, which were not in controversy in that suit, bequeathed all the rest, residue and remainder of his property to the corporations of the cities of New-Orleans and Baltimore forever, one half to each for the education of the poor in those cities; it was held that those cities were corporations, having a right to take the legacies for the purposes contemplated by the will.[2]

In like manner it was held that the corporation of Philadelphia had power, under its charter, to take real and personal estate by deed, and also by devise; and that where a corporation possesses this power, it may also take and hold property in trust, in the same manner and to the same extent that a private person may do; if the trust be repugnant to or inconsistent with the proper purpose for which the corporation was created, it may not be compellable to execute it, and a court of equity will appoint a new trustee to enforce and perfect the objects of the trust. Neither is there, it seems, any positive objection in point of law to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them.[3] This perhaps would not be admissible in New-York, since the Revised Statutes. The trusts created by the will of the late Stephen Girard were upheld upon the gen-

[1] Baptist Church of Hartford v. Wetherell, 3 Paige, 296. Potter v. Chapin, 6 id. 639. City of Cincinnati v. White, 6 Pet. 431. Beaty v. Kerts, 2 id. 566. Banks v. Phelan, 4 Barb. 80. King v. Woodhull, 3 Edw. Ch. R. 79. Wright v. Meth. Epis. Church, 1 Hoff. Ch. R. 202. Hornbeck v. Am. Bible Society, 2 Sandf. Ch. R. 133. Shotwell v. Mott, 2 id. 46. Bac. Abr. tit. Char. Uses, E.

[2] McDonough's Executors v. Murdock, 15 How. 367.

[3] Vidal v. Executors of Girard, 2 How 127.

eral doctrine of charitable uses. And it was said that donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities, in the sense of the common law. The doctrine does not seem, in Pennsylvania, to rest on the statute 43 Eliz. ch. 4, which has indeed been recognized by the courts of that state, but not only these but the more extensive range of charitable uses which chancery supported before that statute, and beyond it, are recognized and confirmed.[1]

In the case of Williams v. Williams, which has already been frequently cited under this head, the questions arose, under a bill filed by the residuary legatees under the will of Nathaniel Potter, the testator, to set aside two legacies, one in favor of the Presbyterian church and congregation of the village of Huntington, and the other in favor of trustees of a fund for the gratuitous education of certain poor children. The first legacy was given in these words; "I give and bequeath the trustees of the Presbyterian church and congregation in the village of Huntington, and their successors, in trust for the support of a minister of the said church as now constituted, the sum of six thousand dollars, to be managed in manner following, to wit: the principal to be loaned, and one half of the interest annually accruing to be added to the principal until the fund shall amount to ten thousand dollars. The other half of said interest to be applied to the support of a minister in such church; and as soon as the whole fund, by the addition of the interest as aforesaid, shall amount to the sum of ten thousand dollars, the whole interest annually accruing, to be annually applied to the support of the gospel minister in said church as now constituted." It was provided that a pew, free of rent, in the church, should be reserved for the use of that part of the testator's family which might reside in Huntington. No part of the fund was to be applied to building or repairing the church; and any diversion of the fund from the purposes for which it was given, was to operate as a forfeiture in favor of the residuary legatees.

The other gift was in the following language: "With a desire to raise the standard of intellectual and moral improvement among the poor, I constitute and appoint Zophar B. Oakley, John Wood and Charles Sturges of the village of Huntington, and their successors, to be appointed in the manner hereinafter authorized, a board of trustees of a fund which I hereby constitute for the exclusive education of the children of the poor; and in order to maintain the number of the said trustees in perpetuity, I hereby authorize the surviving or remaining trustees to fill up

[1] Vidal v. Executors of Girard.

any vacancy as often as it shall occur by death, resignation, or removal from the village, of any one of the trustees, by the choice of another, to be entered upon the minutes of their proceedings. I give and bequeath to the above named trustees and their successors, appointed as aforesaid, the sum of six thousand dollars, in trust, for a perpetual fund for the education of the children of the poor, who shall be educated in the academy in the village of Huntington; or in case of the destruction of the academy by fire or otherwise, then in the school house next west of the academy, until it shall be rebuilt. No part of this fund ever to be appropriated to the erection or repair of buildings.

"It is my will that this fund shall be managed in manner following, to wit: the principal to be loaned on bond, secured by mortgage of lands of twice the value of the sum loaned, and one half of the interest annually accruing to be added to the principal, until the whole fund amounts to the sum of ten thousand dollars. The other half of the interest to be appropriated and expended in the education of the children of the poor; and when the said fund, by the addition of the interest as aforesaid, shall amount to the said sum of ten thousand dollars, then it is my will that the whole interest of the said fund shall be annually appropriated and expended in the education of the children of the poor, in the academy, in the village of Huntington."

The instruction was to be limited to a good English education, which was to be extended "to the poor of every description, without discrimination of denomination or complexion." The children to be educated were to be such "whose parent's names were not on the tax list; and if the interest annually accruing shall be more than sufficient for this purpose, in such case the surplus shall be expended in the education of children whose parents stand lowest on the tax list, until the whole is absorbed."

There were some other provisions relating to the management of the fund; and the fund was to be forfeited to the residuary legatees in case of a diversion from the objects for which it was given. There was then the following clause: "If the powers of the board of trustees herein constituted shall prove insufficient for the execution of the duties of the trust, it is my will that they shall make application for a special act of incorporation, to enable them to give complete effect to my intentions as above stated." There were other provisions in the will not affecting the questions raised on the argument. It was admitted by the pleadings that the Presbyterian church in Huntington had been incorporated as a religious society, by the name mentioned in the will, under the act pro-

viding for religious incorporations, and that the personal estate of the testator was sufficient to pay the legacies, if they should be held to be valid.

The complainants insisted that the two legacies were void, on account of a perpetual suspension of the power of alienation contrary to law, and of the alleged illegal trusts for accumulation; and they prayed for a decree that the rights of the residuary legatees to the moneys so attempted to be bequeathed, might be settled and declared. The corporation of the church in Huntington, and the three trustees in Huntington, claimed the legacies as valid dispositions of property. The executors admitted the facts, and submitted themselves to the judgment of the court.

The cause having been heard in December, 1844, before Ruggles, V. Chancellor of the second circuit, a decree was made, reciting that it appeared to the court that the two several legacies were valid, and dismissing the bill without costs. An appeal was taken to the chancellor, which, by virtue of the constitution of 1846, and the judiciary act of 1847, was transferred to the supreme court, and having been argued in that court at a general term in the second district in May, 1850, the decree of the vice chancellor was reversed and the legacies were declared to be void. An appeal was then taken by the defendants in the original action to the court of appeals, where the judgment of the supreme court was reversed and the decree of the vice chancellor was affirmed.[1]

As both the legacies in this case were of personal property only, it was unnecessary to decide whether a devise of real estate for the same purposes would have been upheld.

The first legacy being to an incorporation, having power by law to hold property, for the general purposes contemplated by the testator in that bequest, was held to be valid. It was thought not to be essential to the validity of such a bequest, that it should be given generally for all the purposes for which it might be legally used, or for any to which the trustees might see fit to devote it. It was enough that the legacy fell within the general objects for which religious incorporations are created, and did not exceed the amount of property which this corporation was authorized to hold. It was remarked that a religious corporation, under the statute, was competent to take a bequest limited to the erection or repairing of a church, or parsonage, the purchase of a glebe or church yard, for providing sacred music, fuel or lights, for the purchase of a church library and the support of a sabbath school.[2] Such a corporation

[1] Williams v. Williams, supra.

[2] Id. In matter of How, 1 Paige, 214.

may take property in trust for purposes which it is lawful for it to execute, if the property were acquired by itself.

It was held further, that this legacy did not infringe the provisions of the Revised Statutes relative to perpetuities or expectant estates.[1] And it was said that those provisions did not affect conveyances or testamentary gifts to religious or charitable institutions.

With respect to the second legacy above mentioned, it was conceded by the learned judge who delivered the judgment of the court of appeals, that it could not be sustained unless by force of that peculiar system of law, known in England under the name of the law of charitable uses. After showing that the Revised Statutes had not abrogated that doctrine, and that the provisions of those statutes as to perpetuities were inapplicable to such a case, the court decided that the law of charitable uses, as it existed in England at the time of the revolution, and the jurisdiction of the court of chancery over those subjects, were the law of this state on the adoption of the constitution of 1777; that the law has not been repealed, and the existing courts of this state having equity jurisdiction are bound to administer that law. It was accordingly held that both the legacies were valid in law.

In Robertson v. Bullions,[2] the question arose upon an original bill filed by a minority of the trustees of a religious corporation, together with a minority of the society known as the Associate Congregation of Cambridge adhering to the principles of the Associate Synod of North America, against the defendant Bullions, who till his deposition and excommunication had been the settled pastor of said society, and a majority of the trustees and congregation, by whom he was still retained as pastor, notwithstanding his deposition; and the general object of the bill was to restrain the trustees from applying the temporalities of the society to the support of a minister who had been deposed from the ministry by the proper ecclesiastical tribunal and who was still under sentence of deposition. It was charged in the bill and admitted in the answer, "that the property of the congregation was held by the trustees for the sole purpose of being devoted and appropriated to the support and maintenance of the gospel, according to the faith and practice, discipline and government of the Associate Church of North America; according to which principles, no minister under sentence of excommunication can be permitted to occupy the pulpit, or administer divine ordinances in said church or congregation." The vice chancellor of the fourth circuit, to whom the

[1] 1 R. S. 773 § 1. Kane v. Gott, 24 Wend. 662.

[2] 9 Barb. 65; affirmed on appeal, 1 Kern. 243.

cause was referred by the chancellor, decided, amongst other things, that the appropriation of the property of the congregation by the defendants, for the support of the deposed and excommunicated minister, was an unlawful diversion of the property from the purposes and objects of the trust, a violation of their duty as trustees, and an abuse of the power confided to them. This part of the decision of the vice chancellor was in substance affirmed on appeal by the supreme court, and it was not disturbed by the court of appeals; the decree in this respect having been acquiesced in by the defendants.[1]

In Shotwell v. Mott,[2] the questions arose on a bill filed by the sole acting executor of the last will and testament of Nathaniel Smith for a construction of his will, and for directions as to the disposal of the residue of his estate. The testator had amongst other things directed his executors to sell his lands and to distribute the proceeds amongst various persons, together with sundry charitable institutions. It was held by the assistant vice chancellor, that there was a conversion of the real estate, and that the gifts were to be treated as legacies. And it was moreover held, that if they were to be deemed land, they were nevertheless valid, because the Revised Statutes, relative to uses and trusts, do not apply to charitable uses. So, in the same case, a bequest for the use of the poor of the town, and one to an unincorporated religious association for the use of its poor ministers, were held not to be within the provisions of the Revised Statutes against perpetuities; and this doctrine was approved by the learned judge, who gave the opinion of the court of appeals in Williams v. Williams, (supra.) So, in the same case, a bequest for the benefit of poor ministers, of a specified religious denomination, was held to be valid, though the will did not appoint any trustee of the fund. It was said to be competent for the testator to empower the executors and trustees of his will to designate the first trustees of such fund. And if it were otherwise, the trust would remain and the court would appoint the trustees. So, a bequest for the ministers of the New-York Yearly Meeting of Friends called orthodox, who are in limited and straitened circumstances, was held not to be too vague, or uncertain, or too indefinite in its objects.[3] So of a bequest for the relief of such indigent residents of the town of Flushing, as the trustee or trustees of the town for the time being should select.[4]

[1] Robertson v. Bullions, 9 Barb. 65; S. C. 1 Kern. 243.

[2] 2 Sandf. Ch. R. 46.

[3] Shotwell v. Mott, 2 Sandf. Ch. R. 46. Att'y Gen. v. Shore, 7 Sim. 290, note. 11 id. 592. 9 Cl. & Fin. 355.

[4] Coggeshall v. Pelton, 7 J. Ch. R. 292. Potter v. Chapin, 6 Paige, 639.

In another case, which underwent great discussion, and which passed through all the higher courts of the state,[1] Gardiner, president of the senate, in giving what appears to be the prevailing opinion of the court of errors, deduced from the cases the following general propositions on the subject. 1. That in trusts for charitable or pious uses, the intention of the donor is to govern. 2. That in ascertaining that intention, the language of the trust, if clear and explicit, is conclusive evidence of the intention. 3. That where the language is ambiguous or equivocal, resort may be had to extrinsic evidence, not for the purpose of ascertaining the intention of the donor, independent of the deed; but for the purpose of determining the meaning and application of the terms used by him. 4. As a corollary from the above propositions, that general terms are to be construed generally, unless the circumstances under which the trust was made, furnish decisive evidence that they were used in a limited or special sense.

In the application of the foregoing principles, it was shown that where property is conveyed to a religious corporation, (or to a religious society which afterwards becomes incorporated,) to promote the teaching of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, it is the duty of the court of chancery, under its general jurisdiction over trusts, to interpose for the purpose of carrying the trust into execution according to the intention of the donor.

It is a question of much importance in the law of charitable uses, whether property devoted to a particular charity by the donor may be diverted to other objects, if a majority of those for whose use it was accumulated or given, shall concur in such diversion. This subject has been discussed in the courts of this state, and received a decision in conformity to the doctrines of the common law. Accordingly it has been held, that it is not a defense to a suit, brought to enforce a trust, that the deviation from the faith and doctrine, to which the property was devoted by the donor, is sanctioned by a majority of the church or congregation, who, through trustees chosen by such majority, are administering the trust according to their views. And it was said that, in a case of clear violation of a well defined trust of this character, the court would be bound to interfere upon the complaint of a minority against a majority of the congregation.[2] If, indeed, all the congregation concur in the misapplication

[1] Miller v. Gable, 2 Denio, 492, 541; S. C. 10 Paige, 627. Opinion of Assistant V. Ch., 2 Denio, 510.

[2] Miller v. Gable, 2 Denio, 492. Kniskern v. The Lutheran Church of St. Johns, 1 Sandf. Ch. R. 439. Field v. Field, 9 Wend. 394. Robertson v. Bullions, 9 Barb. 132, per Hand, J. Att'y Gen. v. Pearson, 7 Sim. 290. Att'y Gen. v. Shore, id. 309, note

of the fund, there is no individual or *minority* left to invoke the aid of the court; and there remains no one to interfere unless the attorney general should file a bill to establish and compel the execution of the trust, according to the will of the donor; or unless some other party, succeeding to the interest of the donor as heir, next of kin or residuary legatee, as the case may be, should assert his rights. The question, in such case, will arise between other persons than those for whom the original charity was created. Between the latter there can be no controversy if they are all agreed.

It is a point of great importance, in cases arising under the doctrine of charitable uses, whether the intention of the donor may be ascertained from any other source, than from the deed or other instrument by which the charity is created. This point is settled in the English courts, upon sound and enlightened principles, the rejection of which would remove the strongest inducements of individuals to devote any portion of their property to charity. "In every case of charity," said Lord Lyndhurst,[1] "whether the object of the charity be directed to religious purposes or to purposes purely civil, it is the duty of the court to give effect to the intent of the founder, provided this can be done without infringing any known rule of law. It is a principle that is uniformly acted upon in courts of equity. If the terms of the deed of foundation be clear and precise in language, and clear and precise in the application, the course of the court is free from difficulty. If, on the other hand, the terms which are made use of are obscure, doubtful or equivocal, either in themselves or in the application of them, it then becomes the duty of the court to ascertain by evidence, as well as it is able, what was the intent of the founder of the charity, in what sense the particular expressions were used. It is a question of evidence, and that evidence will vary with the circumstances of each particular case; it is a question of fact to be determined, and the moment the fact is known and ascertained, the application of the principle is clear and easy."

"It can scarcely be necessary to cite authorities in support of these principles. They are founded in common sense and common justice; but if it were necessary to refer to any authority, I might refer to the case of the Attorney General v. Pearson, and to another case which was cited at the bar, the case in the house of lords. Throughout those judgments, the principles which have been stated were acknowledged and acted upon

[1] See his opinion in Att'y Gen. v. Shore, 7 Sim. 290. Note to Att'y Gen. v. Pearson, 11 id. 592. Shore v. Wilson, 9 Cl. & Fin. 355. 5 Scott's New R. 958. 11 Sim. 615.

by a noble and learned judge, (Lord Eldon,) of more experience in courts of equity, and more experience in questions of this nature, than any other living person. I look upon it, then, that these principles are clear and established, and that they admit of no doubt whatever."[1]

Those in this country who repudiate this doctrine sometimes rely upon the doubt of the chancellor in the Baptist Church of Hartford v. Witherell,[2] as to the propriety of the doctrine of Lord Eldon in the Attorney General v. Pearson.[3] But when it is considered that the remarks of the chancellor, in that case, were not necessary to a right decision of it, and have since been withdrawn by him,[4] and have been dissented from by the highest court in the state,[5] it would seem that the dictum in question should not be regarded as authority. Indeed, the chancellor seems to recognize the recent English cases as sound law, in his opinion in Miller v. Gable.[6]

The doctrine of Lord Lyndhurst was substantially adopted by the court of errors in Miller v. Gable, already cited, and the recent English cases were referred to with apparent approbation. The principles deduced from them by Gardiner, president of the senate, have already been stated, and they seem to give a rule on this subject, as definite as the nature of the subject will allow.

In the case of the Attorney General v. Shore, commonly known as the Lady Hewley charity, the language of the deed which raised the trust was, "to assist poor and godly preachers of Christ's holy gospel." The Unitarians were in possession and claimed the fund, and amongst other things, evidence was received, that Lady Hewley, the donor, was a Presbyterian, and a believer of the doctrine of the trinity. The object of the parol proof was to show that she had not used the term "godly" as applicable to a class of preachers who denied what she esteemed a fundamental doctrine of the gospel. The language in its application was ambiguous; it would be used by a Unitarian in one sense, and by a Trinitarian in another. The one would deem it a part of Christ's "holy gospel" to deny, the other to assert, the divinity of the Savior. The court being of the opinion, upon the evidence, that the funds were misapplied, and considering the danger of future abuse from the fact that the trustees were Unitarians, removed the trustees, and affirmed the decree of the vice

[1] 9 Clark & Fin. 355. 1 Greenl. Ev. § 295, note.

[2] 3 Paige, 304.

[3] 3 Meriv. 264.

[4] See his remarks in Gable v. Miller, 10 Paige, 647.

[5] Miller v. Gable, 2 Denio, 548.

[6] 10 Paige, 647, citing 2 Russ. 114. Milligan v. Mitchell, 1 Myl. & K. 446; S. C. 3 Myl. & C. 72. Att'y Gen. v. Pearson, 7 Sim. 290.

chancellor, which excluded persons professing Unitarian opinions from participating in the benefit or administration of the charity.

In Miller v. Gable,[1] land was conveyed to trustees in 1765, for the use of a church known as the German Reformed Church of the city of New-York, which was Calvinistic in doctrine, and in the declaration of trust was called the Calvinistic church in the city of New-York, worshipping in the German language; which declaration of trust stated that the property was purchased by contributions from certain German and Swiss inhabitants of the city of New-York, *with the assistance of divers charitable and well disposed persons*, as a site for a church *for the worship of God*, and that all persons were inclined *to preserve the estate in all times coming for the pious uses aforesaid.* The trust so created was held by the court of errors not limited to the exclusive use of a congregation holding the doctrines denominated Calvinistic; and such trust was therefore not violated by the application of the property, by a majority of the congregation, to the maintenance of public worship, according to the doctrines of any other evangelical denomination of christians. And when the church referred to in such declaration of trust, though formerly independent, was then connected with the reformed *Dutch* church, and had become subordinate to the ecclesiastical judicatories of that church, and continued so connected for several years, after which the connection was suspended, and again renewed, and finally broken off; and a majority of the congregation devoted the property to the maintenance of its worship as an independent church, though a minority adhered to the connection with the Dutch church, it was also held that there was no violation of trust.

On the principles before stated it should seem that where a church, organized on the basis of *independency*, afterwards unites with the organization of another church, by becoming subordinate to its judicatories, so far as the temporalities are concerned, is binding only so long as the parties to it mutually consent to its continuance. The *denominational name* of a religious corporation or society, to which a donation is made, and the *doctrines actually taught* therein at the time of the gift, may be resorted to in order to limit and define the trust in respect to doctrines usually considered fundamental, such as those in dispute between *Trinitarians* and *Unitarians;* but not as to lesser shades of doctrine.[2]

The Unitarian cases in Massachusetts do not necessarily conflict with those in this state and in England. The former were decided upon their

[1] 2 Denio, 492.

[2] Miller v. Gable, 2 Denio, 492; S. C 10 Paige, 627.

local statutes and usage, and not upon the doctrine of charitable uses.[1] They are, in truth, inapplicable as authorities on this question. It has been decided in that state that the statute of 43 Elizabeth, ch. 4, in regard to gifts to charitable uses, is in force in that state; and upon that principle, a bequest, for charitable uses, to an unincorporated female society in another state, composed in part of married women, was valid; and a court of equity would appoint a trustee to receive the bequest in trust for such charities as are administered by such society.[2]

Courts of equity disclaim all right to interfere with the religious belief of any person, or to prevent the full enjoyment by every citizen of all the rights of conscience secured by the constitution. They merely exercise a benign authority, in the administration of trusts, to prevent the misapplication of property accumulated for one purpose, from being devoted to another and different object. The cardinal design is to carry out the will and intent of the donor, when consistent with the rules of law. If the application of the ordinary doctrines of the court works injustice; or if, by the lapse of time, or other causes, the public good would be promoted by a diversion of the funds to other objects, in whole or in part, the remedy is with the legislature, and not with the courts.[3]

In the case of Andrew v. The General Theological Seminary of the Protestant Episcopal Church in the United States, the New-York Bible and Prayer Book Society, and others,[4] the question arose on a bill filed by the residuary legatees of the late Henry Pope, claiming under his will and codicils, against the defendants, for a final account and distribution of the estate of the testator, setting aside and avoiding two legacies claimed by the two corporations above named. The assistant vice chancellor of the first circuit declared both legacies void, and his decree was affirmed by the superior court of New-York, mainly upon the ground that the doctrine of the English court of chancery applicable to charitable uses was not in force in this state, either because it never was in force here, or because it was abrogated by the repeal, in 1788, of the statute of 43 Elizabeth, ch. 4, and the adoption in 1777 of the first constitution,

[1] Baker v. Fales, 16 Mass. 488. Stebbins v. Jennings, 10 Pick. 172. Page v. Crosby, 24 Pick. 211. Story's Eq. Juris. § 1191, a, note.

[2] Washburn v. Sewall, 9 Metc. 280. Burback v. Whitney, 24 Pick. 146. Bartlett v. Nye, 4 Metc. 378. Bartlett v. King, 12 Mass. 537. Going v. Emmery, 16 Pick. 107. Sanderson v. White, 18 Pickering, 328.

[3] Stat. 7, 8, Vict. sess. 4, ch. 45, (8 Lond. Jurist, 339.)

[4] 4 Sandf. S. C. R. 156, by title, Andrew v. N. Y. Bible and Prayer Book Society, S. C. on appeal, 4 Selden, Dec. T. 1853

which extended its protection to every form and sect of religion; and also upon the ground that the *cy pres* doctrine of the English courts, applicable to charitable uses, has never been held in this state. The court of appeals in December term, 1853, reversed the decrees, both of the superior court and of the assistant vice chancellor, upon the ground that both the bequests might eventually be sustained as gifts to religious and charitable purposes, but without determining absolutely that question, as there was no trustee or person before the court who could claim the disposition of the legacy given to the Auxiliary N. Y. Bible and Common Prayer Book Society. The record was remitted, with leave to the complainants so to amend their bill as to make the attorney general a party, and to proceed with the causes in the court below.

A brief statement of the case will show, that the doctrine of charitable uses, and a limited application of the doctrine of *cy pres*, were necessarily involved in the decision, and their existence in this state sustained by the decree of the court of appeals.

By one bequest, the testator gave to the Auxiliary N. Y. Bible and Common Prayer Book Society, at the death of the last survivor of four annuitants named in the will, $1500, to be placed at interest, and the interest added to the principal for 21 years, or until the sum should amount to $5000, (whichever should first happen,) and the income thereafter to be expended in the purchase and gratuitous distribution of common prayer books.

By the other bequest, the testator gave certain coins and medals, and the sum of $2000, to the trustees and executors named in the will, upon trust, that if upon the death of the surviving annuitant there should be in existence any theological seminary in this state, established under the authority of the general convention of the Protestant Episcopal Church, for the instruction in theological learning of young men intended for the ministry in said church, the trustees should deliver the coins and medals, and pay the money to the managers of such seminary, the coins and medals to be preserved for the use of the seminary, and the interest of the money to be applied in support of a scholarship, to be filled by one of the testator's kindred; and if none should be found qualified and willing to fill such scholarship, then the interest to be given to such person in priest's orders, in said church, as the bishop of the diocese of New-York should appoint; who should preach in Trinity church, at such time or times, during the sitting of the convention of the Protestant Episcopal Church in said state, as said bishop should appoint, one or more lectures of his own composition, upon the evidences and truths of the christian religion, and should afterwards print and publish the same: such dispo-

sition to continue yearly until one of the testator's kindred should be found, willing and qualified to take the scholarship; and the like disposition forever thereafter in like cases of vacancy. If no such seminary should be in existence at the death of the last surviving annuitant, the coins and medals were to be retained, and the money to be kept at interest and accumulated by the trustees, until such institution should be formed; and if not formed within twenty-one years after the death of the last annuitant, the whole to fall into the general residue of the estate.

The charter of the Auxiliary New-York Bible and Common Prayer Book Society, granted in 1817, expired in 1837. That society was organized, and had, during its existence, acted as an auxiliary to the New-York Bible and Common Prayer Book Society, whose corporate powers are still in force, and who claimed the legacy of $1500.

The General Theological Seminary of the Protestant Episcopal Church in the United States, which was, at the death of the last surviving annuitant, (which occurred in 1844,) and still is, an incorporated seminary in this state, answering the description given in the will, claimed the coins and medals, and the legacy of $2000.

It was thought to be quite clear, by the learned judge who delivered the opinion of the superior court, that neither of these legacies could be sustained, if they could be sustained at all, upon any other principle, than the existence in this state of the doctrine applicable to charitable uses; and being of the opinion that that doctrine had been abrogated by the adoption of the first constitution and the repeal of the statute of 43 Elizabeth, ch. 4, the bill was dismissed.[1] The reversal of the decree of the superior court by the court of appeals, in connection with the decision of the latter court, in Williams v. Williams, at the same term, cannot be otherwise treated than as affirming the existence in this state of the doctrine relative to charitable uses, including the doctrine of *cy pres*, in the limited manner which has already been stated.[2]

It is believed that the doctrine in question has no necessary connection with a religious establishment maintained by law; but can be upheld

[1] See opinion of Duer, J. 4 Sandf. S. C. R. 172 to 188, and also his opinion in Ayers v. The Methodist Church, 3 id. 358–379.

[2] See ante. The opinion of the supreme court in the third district, in Yates v. Yates, 9 Barb. 324, 339, and of the learned judge in the 4th district, in Voorhees v. Presbyterian Church of Amsterdam, 17 Barb. 105, are based upon the opinion of Duer, J. in Ayers v. Meth. Epis. Church, 3 Sandf. S. C. R. 351; the doctrine of which is overthrown by the court of appeals in Williams v. Williams, and Andrew v. The N. Y. Bible and Common Prayer Book Society, already considered in the text.

by the courts of equity of any country, where christianity is the prevailing, though not the established religion. A trust to promote doctrines designed to assail and subvert the christian faith,[1] or to introduce customs forbidden by law, or in the language of the constitution, "to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state," cannot be enforced by the courts. Property so devoted by the donor, would not be protected against the claims of those to whom it would pass by law, in case of no valid disposition by its owner. But property may be given in trust for the support of any religious sect, catholic or protestant, when the object of the charity is not forbidden by law, and the doctrines to be disseminated do not tend to licentiousness, and do not justify practices inconsistent with the peace and safety of the state.[2] Whether a use be *superstitious*, and so invalid, must be determined with reference to the general course of those denominations who adopt christianity as their religion. And perhaps no use could be adjudged void as *superstitious*, unless it should be adjudged to be against public policy, or as falling within the range of practices which the constitution does not tolerate.[3]

Nor are we without evidence that, when the general intention of the testator is to give to charity, the failure of the particular mode in which the testator meant to effectuate the charity, shall not, in this state, destroy the charity, even in cases where, by the common law, the purpose could only be carried out in England by the sign manual of the king. Where it is seen that the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention of the testator as to the mode cannot be accomplished.[4] In this state the power has been exercised by the legislature, which in England is carried out by the court of chancery, in conformity to the direction and appointment of the king, under his sign manual. This is apparent from the act passed in 1795, concerning the legacy bequeathed by David Jones for the benefit of a charity school.[5]

From the preamble to that act, it appears that David Jones, late of Fort Neck, in Queen's county, deceased, in and by his last will and testament, did give and bequeath unto the charge and care of the church wardens of the parish of Hempstead, in Queen's county aforesaid, for the time being, and to the charge and care of their successors forever, annu-

[1] Per Hoffman, A. V. Ch. in Miller v. Gable, 2 Denio, 524.

[2] Id. 525.

Bac. Abr. Charitable Uses, D.

[4] Moggridge v. Thackwell, 7 Ves. 69 Att'y Gen. v. Siderfin, 1 Vern. 224.

[5] 18th Sess. chap. 29 2 Webster, 249.

ally chosen by virtue of the act, entitled an act for settling a ministry and raising a maintenance for them in the city of New-York, county of Richmond, Westchester and Queen's county, the sum of £300, current money of New-York, to be lent out on interest on good land security and the said interest annually applied forever in the education and instruction of such poor children belonging to the town of Oysterbay, as the said church wardens for the time being should deem proper objects of charity; the said church wardens once in every year, on the first Tuesday of May, to deliver unto the vestry of the parish of Hempstead, annually elected by virtue of the said act, a just, true and circumstantial account, on oath, of all their proceedings in relation to the disposition and application of the said interest money, and how and to whom the principal sums are lent, and to take the directions of the said vestry with respect to their further proceedings therein; and although the executors of the said last will and testament, or some or one of them, offered to pay the said legacy, yet no person applied for payment thereof, and the same remained unpaid. The act further recited that the executors were dead, and administration of the goods, chattels and credits, which were of the said David Jones at the time of his death not administered by his executors, had been committed to Samuel Jones and Samuel Clowes, who it was suggested would probably soon have assets in their hands sufficient to pay the said sum of £300 pounds; but the act mentioned in the said bequest having been repealed, there was not any person authorized to receive the same. In order, therefore, that the intentions of the testator might be carried into execution, it was enacted that it should be lawful for the said administrators to pay the said £300 to the overseers of the poor of the said town of Oysterbay for the time being, or either of them, whose receipt for the same should be a sufficient discharge to the said administrators for the said legacy. And the said overseers of the poor of the said town of Oysterbay, and their successors, were thereby directed and required to lend out the said sum of £300 at interest on good land security, and to apply the said interest annually forever in the education and instruction of such poor children belonging to the said town of Oysterbay, as the said overseers of the poor of the said town for the time being should deem proper objects of charity; and once in every year, on the last Tuesday in March in every year, to deliver to the town clerk and supervisor for the time being of the said town, and such justice or justices of the peace as might reside in the said town, or such of them as should meet to examine and audit the accounts of the poor of the said town, a just, true and circumstantial account, on oath, of all other proceedings in relation to the disposition and application of the said interest money, and

how and to whom the principal sums were lent. And the said auditing board were required to make a report thereof to the then next town meeting to be held in the said town, and the said town meeting were required to give such directions with respect to the further proceedings of the said overseers therein, as the major part of the freeholders and inhabitants of the said town then met might deem proper or necessary.[1]

If this had been the common case of the failure of a trustee, it is quite clear that legislative aid was not necessary, and that the then court of chancery would have afforded the requisite relief. But the legatee was incapable of taking, and the legacy could not be carried into exact execution according to the will of the testator. We had no officer with the like power of the king of Great Britain, to direct in what mode the intention of the testator should be carried out. It presented a case not within the scope of the jurisdiction of chancery, without the sign manual, and was properly executed by the supreme power of the government.[2]

SECTION XVI.

OF CONSTRUCTIVE OR IMPLIED TRUSTS.

ACCORDING to the division of the subject in the introductory part of this chapter, we are now to treat of *constructive or implied trusts.* Under this head some writers embrace the doctrine of administration, legacies and resulting trusts, the former of which we have sufficiently treated under preceding heads.[3] Legacies are sometimes connected with express trusts, and at other times rest upon the implied trusts on the part of the executors, to distribute the estate according to the expressed or implied intention of the testator. The subject may as appropriately be considered under the head of express trusts, as under that

[1] It would be instructive to learn, after the lapse of over sixty years, in what manner this trust has been managed by the town meeting of the town of Oyster-bay, and what is the present condition of the trust funds.

[2] Story's Eq. § 1169, and cases cited.

Had Frederick Kohn, whose will recently received the consideration of the supreme court of the U. S. been domiciled in this state, at the time of his death, there can be no doubt that the charity he intended to create, could have been executed by the aid of the legislature, as representing the *parens patriæ.* See the case under the title of William Fontain v. William Ravenel, 3 Am. L. Reg. 264.

[3] 1 Mad. Ch. Pr. 466. Story's Eq. Implied Trusts, § 1195.

of implied trusts. Resulting trusts fall more properly under the head of implied trusts; but as they have been abolished in this state, except in favor of creditors, or in case of fraud, they naturally came under our consideration, to some extent, when treating of the statutory changes on this subject.[1]

Whenever the circumstances of a transaction are such, that the person who takes the legal estate in property, cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity; the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who in equity are entitled to the beneficial enjoyment.[2]

These constructive trusts may be separately considered under two distinct classes of cases; first, where the acquisition of the legal *estate* is tainted with fraud, either actual or constructive; and second, where the trust depends upon some general equitable rule, independently of the existence of fraud.

An illustration of the first class of cases may be found where a man purchases land with the funds of another, and, without the consent or knowledge of the party paying the consideration, takes an absolute conveyance in his own name; or, where a party, in violation of some trust, purchases land so conveyed, with moneys belonging to another. These are cases expressly saved by the statute, and a trust results in favor of the party by whom the consideration money is paid, or whose moneys are thus used for that purpose. Before the statute, a trust resulted in favor of the party paying the consideration, whether the deed was taken to another, with or without the consent or knowledge of the party by whom the money was paid. This permitted a secret resulting trust to be created by the party claiming its benefit. It was this latter kind of trust that the statute abolished, leaving the law in full force in relation to such as were the offspring of fraud, on the part of the one who took the conveyance to himself.[3]

The principles settled by the cases prior to the statute, are still applicable, where the resulting trust is recognized by the law; and hence the mode of proof now is the same as that which formerly prevailed. From

[1] 1 R. S. 728, §§ 51 to 53, and ante, p. 417.

[2] Hill on Trustees, 144. Mech. Bank v. Seton, 1 Pet. 309. Wormley v. Wormley, 8 Wheat. 421.

[3] 1 R. S. 728. Reviser's Notes, 3 R. S. 83, 2d ed. Bodine v. Edwards, 10 Paige, 504. Norton v. Stone, 8 id. 222. Loundsbury v. Purdy, 11 Barb. 490; S. C. affirmed, 16 id. 376.

the nature of the case, such transactions almost invariably rest upon parol proof. Such proof is not within the statute of frauds, as it does not contradict the deed, but establishes an independent fact.[1] Such proof is not only admissible against the face of the deed itself, but in opposition to the answer of the trustee denying the trust.[2] And if part only of the consideration is paid, the trust results *pro tanto* only.[3]

A resulting trust must arise, if at all, at the time of the conveyance. It cannot arise after the legal title has passed to the grantee by a subsequent application of the funds of a third person to pay the purchase money, or for the improvements of the property so as divest the legal estate of the grantee.[4] To constitute a resulting trust in real estate, it is necessary that the consideration money, upon the purchase, should have belonged to the cestui que trust, or that it should have been advanced by some other person as a loan to him, or that it should have been advanced as a gift to him, or for his benefit.[5]

A resulting trust is the mere creature of equity, as a resulting use is of law; and it cannot, therefore, arise where there is an express trust declared by the parties, and evidenced by a written declaration of such express trust.[6]

Equity will never raise a resulting trust in fraud of the laws of the land. The law will never cast the legal or equitable estate upon a person who has no right to hold it; although an estate may, by an express contract or conveyance, be vested in an alien, until office found, for the benefit of the people of the state. Where an alien, therefore, purchases land and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser, who cannot hold the land, any more than it would cast it by descent upon an alien heir, who cannot hold it against the state. The result in such a case must be, either that the nominal grantee takes the land, discharged of any trust by mere implication of law, or that there is a resulting trust in behalf of the people of the state, which they alone can enforce against the grantee in the deed.[7]

But a court of equity will not suffer this principle to operate to the

[1] Boyd v. McLean, 1 J. Ch. R. 582. Botsford v. Burr, 2 id. 405. Livingston v. Livingston, id. 537. Jackson v. Sternberg, 1 John. Cas. 153. 11 J. R. 91. 13 id. 463. 16 id. 197. Hosford v. Merwin, 5 Barb. 51.

[2] Boyd v. McLean, supra.

[3] Botsford v. Burr, supra.

[4] Rogers v. Murray, 3 Paige, 390. Botsford v. Burr, supra.

[5] Getman v. Getman, 1 Barb. Ch. R. 499.

[6] St. John v. Benedict, 6 J. Ch. R. 115. Leggett v. Dubois, 5 Paige, 117.

[7] Id. 118. Hubbard v. Goodwin, 3 Leigh's R. 514.

prejudice of an alien, when the purchase of real estate for his benefit is made as a means of collecting a debt due to him, and without his knowl edge, and with no view of defeating the policy of the law. Hence, where land is taken in payment of a debt due to an alien, and conveyed to a trustee upon a valid trust to sell the same and convert it into personal estate, without any unreasonable delay, for the benefit of the cestui que trust, a court of equity, upon the principles of equitable conversion, will consider the land as personal estate belonging to the alien, and transmissible to his personal representatives as such; and if necessary, will compel the trustee, who holds the legal estate, to sell the land and convert it into money.[1]

Thus, where an attorney, who was employed to collect a partnership debt due to a firm, the members of which were aliens; but on account of the alienage of the creditors, and without any directions from them, took the conveyance in his own name, to enable him to sell the land and convert it into money, and wrote to them informing them what he had done, and promising to sell the land for them as soon as purchasers could be found, but died before any sale of the land had been made, and his heirs, after his death, sold the land, supposing it to be their own; it was held that the proceeds of such sale, in the hands of the heirs, were personal property belonging to the copartnership firm, and that the personal representatives of the last surviving partner were entitled to recover such proceeds as a part of the copartnership effects.[2]

The trust which results in favor of creditors, under the provisions of the Revised Statutes relative to uses and trusts, where a grant is made to one person and the consideration therefor is paid by another,[3] is only a trust in favor of those who were creditors of the person paying the consideration at the time when the conveyance was executed and such consideration was paid. There is no resulting trust in favor of creditors whose debts are subsequently contracted.[4]

The object of the statute is to prevent a fraud upon creditors. If the party paying a consideration owes a debt to the party to whom the conveyance was made, and pays the consideration at the request of the latter and in discharge or on account of the debt, the creditors of the party paying the money have no equity against the grantee of the land. Where says Bronson, Ch. J.,[5] there is an existing obligation, either legal or moral, to pay so much money, and the payment is not made with any refer-

[1] Anstice v. Brown, 6 Paige, 448.
[2] Id. Craig v. Leslie, 3 Wheat. 563.
[3] 1 R. S. 728, § 52.
[4] Brewster v. Power, 10 Paige, 562 Wait v. Day, 4 Denio, 443.
[5] Wait v. Day, 4 Denio, 444.

ence to the future, nor by way of mere gratuity, the case is not within the mischief against which the legislature intended to provide. But where the payment is made by way of gift, to some favorite, whom the debtor may be willing to prefer before his creditors; or the purchase is made upon any trust, express or implied, that the debtor shall in any form reap the fruits of it; and in all cases where there is no present duty, legal or moral, to pay the money, the payment is a fraud upon creditors and they can reach the land by their judgments and executions.[1] As a necessary consequence from these principles, it was thought to be clear that a purchase made by way of gift or advancement to a mistress, although it may not look to future cohabitation, cannot be supported. Creditors, it was said, have a higher and better claim than such a woman. It is hardly necessary to add, that a payment which looks to future cohabitation, cannot for a moment be defended as against creditors.[2]

As a resulting trust may be proved by parol evidence, so it may be rebutted by evidence of the same kind.[3]

At common law the appointment of an executor vests in him all the personal estate of his testator, and if any surplus remains after payment of funeral expenses and debts, such surplus will belong to the executor. But, in equity, if it can be collected from any circumstances or expressions in the will, that the testator intended to confer on his executor only the office, and not the beneficial interest, such intention shall receive effect, and the executor shall be deemed a trustee for those on whom the law casts the surplus in case of a complete intestacy. The cases on the subject in the English books are numerous, and to some extent contradictory, as to the circumstances which will be sufficient to exclude the executor from the surplus. They are collected and reviewed by Mr. Fonblanque in his notes to the Treatise of Equity.[4] In this state the English rule has long since been abrogated, and the executor treated as a trustee of the unbequeathed surplus for the benefit of the widow, children and next of kin of the testator.[5] A similar rule has lately been adopted in England by the act of 1 Wm. 4, chapter 40.[6] It seems unnecessary, therefore, to review the numerous cases which have been adjudged on this subject before the alteration of the common law rule. Our statute treats the

[1] Wait v. Day, 4 Denio, 444. The chancellor, in Brewster v. Power, supra, expressed the opinion that the creditor could only reach the land by a bill in equity, and not by sale under an execution at law.

[2] Id.

[3] Jackson v. Feller, 2 Wend. 465.

[4] 2 Fonb. B. 2, ch. 5, § 3.

[5] 2 R. S. 96, § 75.

[6] 2 Wills. Ex. 899.

executors as trustees, and makes provision, which the common law did not, for their compensation.[1] It is probable that some similar provision exists in the other states.

The same doctrine of resulting trusts arises upon conveyances. If the grantor of real estate, even for a consideration, conveys a less interest than he owns, the residue results to him or his heirs; or which is in effect the same thing, it remains in him. Thus, if the owner of the fee grant a life estate to B., the remainder undisposed of still rests in the grantor and will descend to his heirs, unless devised by his will.[2] And as a use will not arise without a consideration, a deed of land without a consideration will not pass the title to the grantee; but will result to the use of the grantor. But if there be a consideration expressed, though merely nominal, the use will not result to the grantor, the payment of even a nominal consideration showing an intent that the grantee should have the use.[3] The whole doctrine rests upon the principle that the trust results in favor of the party who advanced the consideration; and of course, if no consideration was advanced by any body, the trust will result in favor of the grantor, and the estate will thus remain in him.[4] The object of inserting a consideration in a deed is to prevent a resulting trust.[5]

The principle extends to a great variety of cases, many of which have already been sufficiently treated under the head of fraud. In some cases, for example, where a purchase is made by a party standing in such relation of trust and confidence to the vendor as to give him an influence over him, the sale will be set aside at the instance of the party beneficially interested, or at his election it will be suffered to stand. In others, the purchaser will be converted into a trustee. Thus, where an agent employed to purchase an estate, became the purchaser for himself, he was treated by the court as a trustee for his principal.[6] On the like principle, an agent employed to settle a debt, due from his principal, will not be permitted to derive any benefit from it by purchasing it himself; because it is his duty, on behalf of his employer, to settle the debt upon the best terms he can obtain; and if he is enabled to procure a settlement of the debt for any thing less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate

[1] 2 R. S. 93, § 58. McWhorter v. Benson, 1 Hopk. Ch. R. 28.

[2] 2 Fonb. Eq. B. 2, ch. 5, § 4 and notes.

[3] Id. § 2 and notes.

[4] Bottsford v. Burr, 2 J. Ch. R. 405, 410. Porter's case, 1 Co. 22, 26 a, and notes. Belden v. Seymour, 8 Conn. 312.

[5] Id.

[6] Lees v. Nuttal, 1 Russ. & Myl. 53.

that duty, if he might take an assignment of the debt he was employed to settle, and so make himself a creditor of his employer, to the full amount of the debt, which he was employed to settle. If therefore an agent obtain, under these circumstances, an assignment of a debt due from his principal, he will be held a trustee for his principal, and will only be entitled to the sum he actually paid for the debt.[1] So also, where a surety gets rid of, and discharges an obligation at a less sum than the full amount, he will not be allowed, as against his principal, to make himself a creditor for the whole amount, but only for the amount which he has actually paid in discharge of the common obligation.[2]

The cases on this subject do not rest upon the actual existence of fraud in the particular case, but upon principles of public policy. In the leading case on this subject, Lord Thurlow said, if a trustee, though strictly honest, buys an estate himself and then sells it for more; according to the rules of a court of equity, from general policy, and not from any peculiar imputation of fraud, he shall not be permitted to sell to himself, *but shall remain a trustee* to all intents and purposes. And, in that case, having sold the property at a highly advanced price, he was decreed a trustee, as to the sums produced by the second sale, for the original vendor.[3]

The same principle was applied, in an early case, to the renewal of a lease by a trustee in his own name and for his own benefit. Even in the absence of fraud, and on the refusal of the lessor to grant a new lease to the cestui que trust, the lease so taken was decreed to be held upon trust for the person entitled to the old lease.[4]

The equitable maxim that a trustee is disabled to purchase, for his own benefit, at the sale of the trust property, is derived, *first*, from the general principle in the doctrine of trusts, that a person assuming a fiduciary relation towards another, in regard to property, is bound to exercise, for the benefit of his cestui que trusts, all the rights, powers, knowledge and advantage, of every description, which he derives from that position, or acquires by means of it; at least he is disabled from exerting them for his own private benefit; and *second*, from the specific and positive rule, that an agent to sell for others, though he have but a mere ministerial power for that single purpose, is disabled from being a purchaser at the sale.[5]

[1] Reed v. Norris, 2 Myl. & Cr. 374.

[2] Id.

[3] Fox v. Mackreth, 2 Bro. C. C. 400. 2 Cox, 320. White's Eq. Cas. 72, 105, and see the notes to that case in the American edition, where the principal cases are collected and reviewed.

[4] Kiech v. Sandford, 2 Eq. Cas. Abr. 741. White's Leading Cases in Eq. 32, Hare and Wallace's ed. 47, and notes.

[5] White's Eq. Cas. 137, notes to H. & W

These principles are firmly established in equity jurisprudence, and are stated in various forms in the cases. Chancellor Walworth says, on one occasion, that it is a rule of equity, of universal application, that no person can be permitted to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser.[1] The rule is not confined to a particular class of persons, such as guardians, trustees, solicitors and attorneys, but is of universal application to all persons who come within the principle. It has been applied to executors, administrators and agents.

It matters not, in cases falling within the principle, that no fraud was intended, and no actual injury done. The rule is rather intended to prevent wrong, than to remedy it; though both objects will be accomplished if it be strictly followed. It is the offspring of the doctrine of trusts, and it enables a court of equity to remove the temptation to do wrong, by converting the wrongful act into rightful purposes. Nothing less than incapacity is able to shut the door against temptation, where the danger is imminent and the security against temptation great. The wise policy of the law has, therefore, put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation.[2]

The rule was well stated by the learned judge who delivered the opinion of the supreme court of the United States in one of the cases cited, (Michoud v. Girod, supra.) "The general rule," said the learned judge, "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase, is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interferes. It acts on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it

[1] Torrey v. Bank of Orleans, 9 Paige, 663. Hawley v. Cramer, 4 Cowen, 736. Van Epps v. Van Epps, 9 Paige, 237, 241. Cram v. Mitchell, 1 Sandf. Ch. R. 251, 256. Dobson v. Racey, 3 id. 61. Davou v. Fanning, 2 J. Ch. R. 252. Michoud v. Girod, 4 How. S. C. 503. Greenlaw v. King, 5 Lond. Jurist, 18, before Lord Cottingham. De Caters v. Le Ray Chaumont, 3 Paige, 178. Hamilton v. Wright, 9 C. & Fin. 111. Bostwick v. Adams, 3 Comst. 60.

[2] Id. Davou v. Fanning, 2 J. J. Ch. R 270 8 Tomlin's Brown 42, 63

provides against the probability, in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty. It therefore prohibits a party from purchasing, on his own account, that which his duty or trust requires him to sell on account of another, and from purchasing, on account of another, that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."[1]

Where a person stands as trustee for others, and bound in that character to protect the general interests of those for whose benefit the trust was created, in regard to the subject of the sale, he is equally incapacitated from purchasing for his own benefit, at a sale under an adverse proceeding, and at a judicial sale, as at his own sale, under his power as trustee. The reason is; as general trustee of the subject, it is his duty to make it bring as much as possible, at any sale that may take place; and therefore he cannot put himself in a situation where it becomes his interest that the property should bring the least sum.[2]

The Revised Statutes of this state have expressly forbid executors or administrators, making a sale of the real estate of the deceased sold under an order of the surrogate, and the guardians of any minor heirs of the deceased, from purchasing directly or indirectly, or being interested in the purchase of any part of the real estate so sold; and they enact that all sales made contrary to the provisions of the section shall be void; but the prohibition does not extend to a purchase by a guardian for the benefit of his ward.[3]

In cases not within the statute prohibition, it is presumed that a trustee may purchase by the consent of the court of chancery; but the court will always require, upon such application, such facts to be shown as justify a departure from the general rule.[4] If a trustee has a personal interest in the sale, which may be sacrificed if he is not allowed to become a bidder, the court will substitute, in his place, a master or another trustee to execute the trust, if it can be done without injury to the interest of the *cestui que trust*.[5]

Though trustees and those sustaining that relation are forbidden to purchase, without leave of the court, or the assent of those interested in the trust property, still their purchase is not absolutely void at law;

[1] Wormley v. Wormley, 8 Wheat. 421. Prevost v. Gratz, 6 id. 481.

[2] Chapin v. Weed, 1 Clarke's Ch. 464.

[3] 2 R. S. 104, § 27.

[4] Davou v. Fanning, 2 J. Ch. R. 252, 262. Dobson v. Racey, 3 Sandf. 61. De Caters v. Chaumont, 3 Paige, 178.

[5] Id.

but is voidable only in a court of equity at the suit of the *cestui que trusts*. It stands valid, therefore, unless some one thus interested elect to avoid it. The equity of the *cestui que trusts* is to have the option of confirming it and holding the trustee to it, or of setting it aside and having a resale ordered. No person but the *cestui que trust*, or some one standing in his place, can apply to be relieved, and a stranger cannot avoid it.[1] And the application must be made within a resonable time, and if not so made, it will be considered as a waiver or abandonment of the right.[2] If the property has been sold without notice by the trustee to a bona fide purchaser, before the *cestui que trust* applies to the court, the original sale cannot be set aside, and the remedy will be only personal against the trustee for an account of the profit, if he made any.[3]

The doctrine above stated relates only to executed contracts. If the bargain be not completed, and the aid of the court be invoked in behalf of a trustee or agent to compel a specific performance of the agreement, and the *cestui que trusts* be parties, and object to a confirmation of the sale, a court of equity will not decree performance against their objection, though the case be otherwise free from difficulty.[4] Thus, the court refused to decree performance of an executory contract of an executor, having a power to sell under the will, made with his *cestui que trust*, to purchase the subject of the trust, upon the principle that such purchase is not favored by the court.[5] If the *cestui que trust* has the right as a matter of course to have the sale set aside and a resale ordered, as is evident from all the cases before cited that he has, it follows as a necessary consequence that the trustee, while the purchase is incomplete and executory, cannot have any equity against the *cestui que trust*, for a specific performance of the agreement, against the will of the latter. The right of the one to have such a sale set aside, without reference to the question of fraud, is incompatible with a right in the trustee or agent, to have the sale confirmed against the remonstrance of the *cestui que trust*.

On the same principles, where contracts which are made against public policy, though a court of equity will in most cases order them to be given up, even on the application of a person standing in *pari delicto*, yet such contracts cannot be enforced at law, though they be only constructively

[1] Jackson v. Van Dalfson, 5 J. R. 43, 48. Jackson v. Walsh, 14 id. 407. Wilson v. Troup, 2 Cowen, 195. Hawley v. Cramer, 4 id. 719. Davou v. Fanning, 2 J. Ch. R. 252, 268. Jennison v. Hapgood, 7 Pick. 1.

[2] Hawley v. Cramer, 2 Cowen, 718.

[3] Id. Jackson v. Walsh, 14 J. R. 407, 415.

[4] Munroe v. Allaire, 2 Cai. Cas. in Error, 182, approved by Kent in Davou v Fanning, supra.

[5] Id.

fraudulent. The case of marriage brokage bonds affords an illustration of the rule.[1] The court will never aid a party in obtaining the fruits of a contract which was made in contravention of public policy, or the known and established maxims of equity jurisprudence.

The remaining class of constructive trusts, under this head, is that of the purchase from a trustee made with notice of the trust. It is a general rule that a purchaser from a trustee upon notice, though upon full consideration, and *a fortiori*, a volunteer taking with notice, is in equity bound by the trust to the same extent, and in the same manner, as the person from whom he purchased.[2] He is converted into a trustee. And hence, to support a plea of bona fide purchaser, without notice, the defendant must aver and prove, not only that he had no notice of the plaintiff's rights before his purchase, but that he had *actually paid the purchase money* before such notice. Though he *secured* the purchase money, yet if it was not *paid* before notice, it will not be sufficient to maintain the plea.[3]

A purchaser without notice, from one who has fraudulently purchased, is not affected by the fraud; and it is also a well settled rule of equity, that a man who is a purchaser, with notice himself, from a person who bought without notice, may protect himself under the first purchaser. The reason is to prevent a stagnation of property, and because the first purchaser being entitled to hold and enjoy, must be equally entitled to sell.[4]

If, however, the second purchaser be the original trustee, who re-acquires the estate, he will be fixed with the trust.[5]

The notice in these cases may be either to the purchaser himself, or his counsel, attorney or agent; though the counsel, attorney or agent be himself the vendor, or be concerned for both vendor and purchaser.[6] In the latter case, where both sides employ the same agent, as is frequently done in purchases, according to Lord Hardwicke, each side is affected with notice, as much as if different counsel and agents had

[1] St. John v. St. John, 11 Ves. 535. Smith v. Bruning, 2 Vern. 392.

[2] Mead v. Orrery, 3 Atk. 238. Wormley v. Wormley, 8 Wheat. 421. Murray v. Ballou, 1 J. Ch. R. 566. Oliver v. Platt, 3 How. S. C. U. S. 333. Gilchrist v. Stevenson, 9 Barb. 9. The Mechanics' Bank of Alexandria v. Seton, 1 Pet. U. S. R. 309.

[3] Id. 2 Fonb. B. 2, ch. 6, § 2 and notes. 3 P. Wms. 307.

[4] Alexander v. Pendleton, 8 Cranch, 462. Jackson v. Given, 8 J. R. 141. Rumfus v. Platnir, 1 J. Ch. R. 219. Demaret v. Wynkoop, 3 id. 147.

[5] Bovey v. Smith, 1 Vern. 149. Hill on Trustees, 231.

[6] Le Neve v. Le Neve, 3 Atk. 646.

been employed.[1] If an agent who acts in that character for both parties, with their knowledge and assent, receives notice of a fraud, both parties are chargeable with knowledge of the fraud.[2]

As a general rule, notice to the agent, to be effective, must be in the course of the same transaction.[3] This rule is not without its exceptions; and is not to be received but with qualifications. Where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of a solicitor, when engaged in another transaction, there is no ground for the distinction, by which the rule that notice to the solicitor is notice to the client, has been restricted to the same transaction.[4] In adverting to the decision of Sir John Leach, that notice to a man in one transaction is not to be taken as notice to him in another transaction, Lord Eldon said in one case, that it should be considered "whether one transaction might not follow so close upon another, as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening: it must in all cases depend upon the circumstances."[5] It would seem to follow, that if the circumstances be such, that the agent must be presumed to recollect the fact of which the notice is predicated, that his principal is chargeable with the like notice, though it was not received by the agent in the same transaction.[6]

In cases where it is necessary to charge a party with notice of an incumbrance or other infirmity in his title, notice to a husband is not notice to the wife.[7]

Having brought under review some of the cases where the acquisition of the legal title is tainted with fraud, either actual or constructive, in which the party acquiring the title will be converted into a trustee, we proceed to notice, in the next place, some cases in which courts of equity convert the holder of the legal estate, though unaffected with fraud, either

[1] Le Neve v. Le Neve, 3 Atk. 648. Kennedy v. Greene, 3 Myl. & K. 699. Dryden v. Frost, 3 Myl. & C. 670.

[2] Id.

[3] Bank U. S. v. Davis, 2 Hill, 451. Warwick v. Warwick, 3 Atk. 294. Hiern v. Mills, 13 Ves. 120. Mech. Bank v. Seton, 1 Pet. 309.

[4] Hargreaves v. Rothwell, 1 Keene, 154. Perkins v. Bradley, 1 Hare, 230.

[5] Mountford v. Scott, 1 T. & R. 274, 280.

[6] Westervelt v. Haff, 2 Sandf. Ch. R. 98. Kennedy v. Green, 3 M. & K. 699.

[7] Snyder v. Sponable, 1 Hill, 567; affirmed 7 id. 427.

actual or constructive, into a trustee for the party who is entitled, by the rules of equity, to the beneficial interest.

The most obvious instance of this kind, is where a man has entered into an executory contract to purchase real estate. In this case, at law, the legal title remains unaffected by the contract, and the purchaser has acquired only a right of action for breach of contract in case it is not performed. But a court of equity views the transaction in a different light. One of the primary maxims of that court is, as has been shown elsewhere, that it looks upon things agreed to be done, as actually performed. Acting on this principle, when the contract is made, it considers the vendor as a trustee of the purchaser of the estate sold; and the purchaser as a trustee of the purchase money for the vendor.[1]

The equity attaches immediately on making the contract, and will not therefore, be affected by the subsequent death, or any other act of either of the parties, before the contract is carried into execution. The trust in the vendor for the vendee, in such a case, attaches to the land, and binds the heir of the former. If the latter be an infant, or a lunatic, and his estate in the hands of a committee, equity has power to carry the agreement into effect by a specific performance.[2]

This doctrine applies also to cases where a trust has been created and no trustee has been appointed, or the trustee was incapable of acting, or has died. As equity permits no valid trust to fail for the want of a trustee, the court will appoint one;[3] or will follow the estate into the hands of the party to whom it has passed, and treat him as a trustee.[4] In this state it has been seen, that the trust, on the failure of the trustees by death, vests in the court of chancery, and does not descend to the heir.[5]

As the trust attaches to the land which is the subject of it, it becomes obligatory on a purchaser with notice, by such purchase; and he will be decreed to execute the trust, unless the purchase be with the permission of a court of equity.

At common law, every corporation aggregate had an unlimited power over its property, and might alienate the same in fee, or grant any lesser estates therein without limitation or restriction.[6] And the same power is recognized by the Revised Statutes.[7] The legislature, in 1806, amended the act in relation to religious incorporations; and authorized

[1] Malin v. Malin, 1 Wend. 625. Champion v. Brown, 6 J. Ch. R. 402. Watson v. Le Row, 6 Barb. 484.

[2] Swartout v. Burr, 1 Barb. S. C. R. 495. Sutphen v. Fowler, 9 Paige, 280.

[3] King v. Donnelly, 5 Paige, 46.

[4] Cushney v. Henry, 4 Paige, 345.

[5] 1 R. S. 720, § 68.

[6] Co. Litt. 44 a, 300 l, per Ld. Mansfield, 1 Bur. R. 221. Dutch Church v. Mott, 7 Paige, 83.

[7] 1 R. S. 599. § 1.

the chancellor, upon the application of any such incorporation, in case he should deem it proper, to make an order for the sale of any real estate belonging to such incorporation, and to direct the application of the money arising therefrom, by the said corporation, to such uses as the same corporation, with the consent and approbation of the chancellor, should conceive to be most for the interest of the society to which the real estate so sold belonged.[1] But for such consent of the court of equity the purchasers would receive the property, charged with the trusts fastened upon it, while in the hands of the corporation, and would themselves become trustees for the original purpose for which it was acquired.[2]

Another instance of a constructive trust of this kind is the case of a person taking property from a trustee without notice of the trust, but without having given any valuable consideration for it.[3] In such a case, the party receiving the property, though guilty of no fraud, will be treated as a trustee in the same manner as we have shown a purchaser with notice will be regarded. A purchaser however without notice, and upon a valuable consideration, we have seen, will be protected.

Another instance of trustees, created by the position which they happen to occupy at the time, arises on the dissolution of any corporation. In such a case, where no other persons are appointed by the legislature or some court of adequate jurisdiction, the statute enacts that the directors or managers, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain, after the payment of debts and necessary expenses.[4]

SECTION XVII.

OF THE OFFICE AND DUTIES OF TRUSTEES AND THE RIGHTS OF CESTUI QUE TRUSTS.

THE general nature of the office of a trustee, and of the reciprocal rights and duties of a trustee and *cestui que trust* may perhaps be col-

[1] L. of 1806, ch. 43, p. 360. Gen. Act, 3 R. S. 292, 298, § 11.

[2] Dutch Church v. Mott, 7 Paige, 84.

[3] Jewett v. Palmer, 7 J. Ch. R. 65.

[4] 1 R. S. 600, § 9.

lected from what has already been said, in various parts of this treatise. The nature of his *estate* has been fully considered. And we may, without repeating what has been said elsewhere, present, in a brief space, some of the incidents and some of the principles which regulate the relation between the trustee and his *cestui que trust.*

A trustee having accepted the office cannot, by his own act, and without the authority of the court, renounce it.[1] Being an office of personal confidence, he cannot delegate his authority to others.[2] When the administration of the trust is committed to more than one person, without an express authority for the majority to act, all must join in the administration of the trust, and if one refuses to act, the trust devolves upon the court.[3] On the death of one trustee, the trust vests in the survivor. Trustees are not liable for each other's default in which they have not concurred. And they can derive no advantage from the office, save the per centage allowed by law, and their actual and necessary expenses.[4]

It is under this last rule that a trustee is disabled to purchase, for his own benefit, at a sale of the trust property. The principle is not confined to mere technical trustees, but extends to all persons who act in a representative capacity, and whose business it is to protect the interest of others, such as executors and administrators, guardians, attorneys, general and special agents, committees of the estates of lunatics, and the like. In short, as was said in one of the cases, no person can become a purchaser of an interest in property, where he has a duty to perform which is inconsistent with the character of a purchaser.[5] But this subject is sufficiently discussed under other heads.[6] It has already been sufficiently shown, that no act of the trustee can deprive the *cestui que trust* of his equity to have the benefit of all that has been done in apparent execution of the trust. And hence he may, of course, and without alleging actual fraud in the particular instance, ask for a resale of the property; and whether the property was, or was not, worth more than the amount bid by the trustees, is a matter which is never inquired into. The rights of the *cestui*

[1] Cruger v. Halliday, 11 Paige, 314. Matter of Van Wyck, 1 Barb. Ch. R. 565.

[2] Bro. Max. 665. Ingram v. Ingram, 2 Atk. 88. 2 Kent's Com. 633. Bac. Abr. tit. Grant, E. (5,) p. 517, Buvier's ed.

[3] Matter of Wadsworth, 2 Barb. Ch. R. 381. Burrill v. Shiel, 2 Barb. S. C. R. 457.

[4] Lewen on Trustees, 260. 2 R. S. 93, § 58. Meacham v. Sterns, 9 Paige, 398. Green v. Winter, 1 J. Ch. R. 26. Mumford v. Murray, 6 id. 1. Van Horne v. Fonda, 5 id. 388.

[5] Torrey v. The Bank of Orleans, 9 Paige, 650. Van Epps v. Van Epps, id. 238, 241. Cram v. Mitchell, 1 Sandf. Ch. R. 251, 256. Dobson v. Racey, 3 id. 61.

[6] CHAP. III, *Of Fraud*, Sec. 2.

que trust would be ineffectually protected, unless he had his option to affirm the purchase, or have a resale of the property.[1]

In performing the duties of the office, it is a requirement no less of sound morals than of law, that the trustee should be faithful to his trust.[2] This fidelity will, in general, be exhibited in the seasonable reduction of the property to the possession of the trustee, the safe custody and proper investment of it, and the due application of the trust fund to the purposes of the trust. With respect to executors and administrators, these duties are, with us, declared by statute, in substantial conformity to the requirements of the common law.[3] But while a trustee or executor is in general only answerable for his own default, it is nevertheless his duty to see that the funds in his possession do not pass improperly into the hands of his co-trustee. In such a case, if a loss ensue, both trustees are alike answerable.[4]

If the trust funds in the hands of the trustee are not needed for the purposes of the trust, it is the duty of the trustee to make the fund productive to the cestui que trust, by the investment of it in some proper security.[5] With regard to what shall be deemed proper security, the general rule is, that the trustee must not rest on personal security, and if he does, it is at his own hazard. On one occasion, Lord Kenyon said, that it was never heard of that a trustee could lend an infant's money on private security. If he does, and takes a bond, with personal security, he must be responsible if the obligors become insolvent, though they were in very ample circumstances at the time the money was lent.[6] And this doctrine seems to be indisputably settled, both in England and in this country.[7] And Chancellor Kent said, in Smith v. Smith, (supra,) that he had no doubt it was a wise and excellent general rule, that a trustee loaning money, must require adequate *real security* or resort to the public funds. The foregoing rule is based upon the assumption that no particular mode of investment is pointed out in the instrument creating the trust. If, for example, executors or other trustees are directed by the instrument creating their authority, to make investments in any specified security, it is their duty to conform to it. In England, it is said,

[1] See cases under preceding note, and Davou v. Fanning, 2 J. Ch. R. 252. Michoud v. Girod, 4 How. S. C. R. 503, 553.

[2] 1 Cor. iv. 2.

[3] 2 R. S. 82, 87, &c. 2 Will. Ex. 640, 653 et seq.

[4] Monell v. Monell, 5 J. Ch. R. 283. Mumford v. Murray, 6 id. 1.

[5] De Peyster v. Clarkson, 2 Wend. 77. Smith v. Smith, 4 J. Ch. R. 284.

[6] Holmes v. Dring, 2 Cox. C. 1.

[7] Id. Pocock v. Reddington, 5 Ves. 799. Terry v. Terry, Prec. in Chan. 273. Wilkes v. Steward, Cooper's Eq. R. 6. Smith v. Smith, 4 J. Ch. R. 284. Ackerman v. Emott, 4 Barb. 626.

that where trustees are expressly authorized to lend on real securities, they must be careful not to advance more than two thirds of the real value of the estate, if it be freehold land; or, if the property consist of houses, or be otherwise of a fluctuating or deteriorating character, they would not be justified in advancing so much. And they are precluded from lending on mortgage to one of themselves.[1]

The trustee, before parting with the trust property to another, should ascertain the right of the party to it. If there be different claimants to it, or there be reasonable doubts as to which of several persons has the rightful legal claim, it is always in the power of the trustee, by a proper application, to obtain the direction of the court. In some cases, an interpleader is the proper remedy, the doctrine of which will be found in its proper place.

Though a trustee has no right to delegate his trust, and if he does so he is himself liable, this does not prevent him from resorting to the usual and ordinary means of collecting and remitting funds.[2]

A trustee should keep his accounts of the transactions in relation to the trust, separate from those of his own private affairs, and should never mingle the trust funds with the individual payments and disbursements of his own business. Where no accounts have been kept, the court will not suffer a trustee to go into a conjectural estimate to show the necessity of his having broken in upon the capital.[3] And where a trustee uses the trust funds, or mingles them with his own, he is chargeable with interest. And so, also, if he has been negligent in not paying the fund over, or properly investing it.[4] But he is not chargeable with imaginary values, or with more than he has received, unless there is evidence of gross negligence, amounting to willful default.[5] And where the litigation arises from the neglect of the trustee to keep proper accounts, and from his misapplication of the funds, he is chargeable with costs.[6]

It results from what has been said that the remedy of the *cestui que trust*, for a violation of duty by the trustee, is in equity. The latter can be compelled to perform the trust, and to render an account of his administration of the trust estate, and to make good any deficiency; and final-

[1] Stickney v. Sewell, 1 Myl. & C. 8.

[2] Knight v. Lord Plymouth, 3 Atk. 480.

[3] Teague v. Dendy, 2 McCord's Ch. R. 212.

[4] Dunscomb v. Dunscomb, 1 J. Ch. R. 516. Manning v. Manning, id. 527. Brown v. Ricket, 4 id. 305. Mumford v. Murray, 6 id. 17. Clarkson v. De Peyster, Hopk. 424. Hart v. Ten Eyck, 2 J. Ch. R. 108. Mumford v. Murray, 6 id. 452. Monell v. Monell, 5 id. 296.

[5] Osgood v. Franklin, 2 J. Ch. R. 1; S. C. 14 J. R. 522.

[6] Spencer v. Spencer 11 Paige, 299

ly, if necessary, can be removed from office for his misconduct. But while the rule of courts of equity is thus severe, in cases of gross delinquency, it will, nevertheless, afford to the trustee, acting in good faith, a prompt indemnity for his necessary disbursements and expenses, and afford him a lien on the trust property for them.[1] He is also entitled to the fees prescribed by law.[2]

[1] Murray v. De Rottenham, 6 J. Ch. R. 52.

[2] 2 R. S. 93, § 58. Meacham v. Sterns, 9 Paige, 398.

CHAPTER VIII.

OF THE PROTECTION AFFORDED BY COURTS OF EQUITY TO PERSONS LABORING UNDER DISABILITY.

THE jurisprudence of any country would be extremely defective, if it possessed no tribunal with jurisdiction adequate to afford protection to those who are laboring under natural or civil disabilities. The weak would be at the mercy of the strong; and those who were disabled by natural causes, or by other means, from managing their own affairs, would fall victims to the cupidity of the artful and designing.

Under the class of persons, thus more or less needing the protection of the law, may be ranked INFANTS, MARRIED WOMEN, and IDIOTS and LUNATICS. We shall devote this chapter to the consideration of the jurisdiction of courts of equity over this class of persons.

SECTION I.

OF INFANTS.

WHATEVER may have been the origin of the jurisdiction of the court of chancery, over the property and persons of infants, it was firmly established in England, long before the colonization and settlement of this country,[1] and has been constantly exerted in this state from the first foundation of the court.[2]

The jurisdiction in question may be appropriately treated under the heads of the *guardianship*, the *maintenance* and the *marriage of in-*

[1] 2 Fonb. Eq. B. 2, ch. 2, § 1, notes.

[2] Mercein v. The People, 25 Wend, 104, per Paige, J.

faults. 1. As a general rule, the father is entitled to the custody of his infant offspring, and when differences exist between the parents, the right of the father is preferred to that of the mother. But he may forfeit the right by misconduct, or lose it by misfortune.[1] In a comparatively recent English case, this general rule was pushed out to its extent, and the exceptions much narrowed.[2] In that case, while the infant children of the marriage were in the custody of the mother, and the father was living in adultery with another woman, the court of king's bench, on a habeas corpus sued out by the husband and father, made an order upon the mother to deliver up the children to him. This supposed state of the law was declared by Lord Denman, who concurred in the decision, to be of such a character that all the judges were ashamed of it; and it was accordingly soon after changed by act of parliament, so as to restore the mother to her natural rights to an equality with her husband, in relation to the care and custody of her children within the age of nurture.[3]

It this state the general subject has been on several occasions most thoroughly discussed, and although there is some conflict of opinion, it is believed that the result of the cases, was correctly stated by Paige, senator, to be: that the right of the father to the custody of his child is not absolute, and that such custody is referable to its interest and welfare, and is to be selected by the court, in the exercise of a sound judicial discretion, irrespective of the claims of either parent.[4]

In those American cases which uphold to the greatest extent the right of the father, it is conceded that it may be lost by ill usage, immoral principles or habits, or by his inability to provide for his children.[5] When this jurisdiction has been exercised by a court of law, under a habeas corpus, there has been the least tendency to a relaxation of the general rule, and the claim of the father has been sustained with the greatest strictness.[6] But even in cases of that kind, it was remarked by an eminent judge, that the attention of the court should be principally directed to the benefit and welfare of the infant; and that this can be better guarded and protected by the court of chancery, under its peculiar jurisdiction, than by a court of law upon *habeas corpus.*[7] Chancellor

[1] The People v. Chegaray, 18 Wend. 637. The People v. ——— 19 id. 16. The King v. De Manneville, 5 East, 221. Wellesley v. Beaufort, 2 Russ. Ch. 1.

[2] King v. Greenhill, 4 Ad. & Ellis, 624.

[3] The People v. Mercein, 25 Wend. 93, 94.

[4] Mercein v. The People, 25 Wend. 105.

[5] Id. 101.

[6] People v. Mercein, 3 Hill, 400.

[7] Matter of Waldron, 13 J. R. 421, per Thompson, Ch. J.

Kent, in an early case before him on a habeas corpus, remarked that the object of the habeas corpus was to deliver from improper restraint, and not to settle, in a summary way, a question of guardianship; and that when an infant was too young to form a judgment, then the court is to exercise a discretion for him.[1]

The legislature have, however, provided that when husband and wife shall live in a state of separation, without being divorced, and shall have any minor child of the marriage, the wife, if she be an inhabitant of this state, may apply to the supreme court for a habeas corpus to have such minor child brought before it. On the return of the writ, the court, on due consideration, is empowered to award the charge and custody of the child to the mother for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require.[2] The supreme court is authorized, after the making such order, to annul, vary or modify the same.[3] In 1818, an act was passed, and which, as revised in 1830, is still in force,[4] empowering the chancellor, a justice of the supreme court, or any circuit judge, upon habeas corpus, to deliver to the husband or to the wife who has not joined the society of Shakers, any child of the marriage detained by the said society. By force of this statute, the parent who joins the said society, forfeits the right of custody of the children, in favor of the parent who does not become a member of that society.

The habeas corpus act, as revised by the legislature in 1830, abrogates the provisions of the common law, in regard to the writ treated of in that article, except so much and such parts of it as may be necessary to carry into full effect the provisions therein contained; and requires the proceedings to be in conformity to the act.[5] But the chancellor was of opinion, that the power of the chancellor to issue a habeas corpus was not derived solely from the statute, but was an inherent power in the court, derived from the common law.[6] And he thought, with Chancellor Kent and the judges whose opinions have been cited, that the writ of habeas corpus is not, either by the common law, or under the provisions of the Revised Statutes, the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant.[7]

The principle on which the parental custody of infant children rests, was elaborately discussed in a recent case in the court of errors, by a

[1] Matter of Woolstencraft, 4 J. Ch. R. 83. The People v. Mercein, 8 Paige, 47. Matter of McDowell, 8 J. R. 328.

[2] 2 R. S. 148, 9, §§ 1, 2.

[3] Id. § 3

[4] L. of 1818, p. 38. 2 R. S. 149, § 4–7.

[5] 2 R. S. 573, § 73.

[6] The People v. Mercein, 8 Paige, 55.

[7] Id.

learned senator, since a member of the supreme court.[1] It was shown that by the law of nature, the father has no paramount right to the custody of his child, over its mother; and that the authority of both is subordinate to that of the state; that there is no parental authority independent of the supreme power of the state; that the former is derived from the latter; and the authority of government must be so exercised as to consult the welfare, comfort and interest of the child during the period of its minority. The decision of the court of king's bench in the case of the King v. Manneville, in 1804, already cited, and which was followed in England in numerous other cases down to 1836,[2] establishing the paramount right of the father to the custody of his infant, in cases where the interest and welfare of the infant called upon the court to commit it to the custody of the mother, was a departure from the earlier cases, and was never the law in this state.

It is generally supposed that, by the common law, the father could not make a testamentary disposition of the guardianship of his infant children, and was not authorized to do so till the 12 Charles 2, ch. 14. This statute, drawn by Lord Hale, enabled the father, but not the mother, to dispose of the guardianship of the child until twenty-one.[3] Under this statute, it was held by Lord Hardwicke, that the guardianship so created did not terminate till the infant arrived at twenty-one, though he married before that time.[4] A different rule prevailed with respect to a female, whose guardianship terminated by marriage within age. This statute was adopted in this state,[5] and was revised in 1830.[6] By the statute as revised, every father, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, is empowered by deed or last will, duly executed, to dispose of the custody and tuition of such child, during its minority, or for any less time, to any person or persons, in possession or remainder. The statute enacts that every such disposition, from the time it shall take effect, shall vest in the person or persons to whom it shall be made, all the rights and powers, and subject him or them to all the duties and obligations of a guardian of such minor, and shall be valid and effectual

[1] Mercein v. The People, 25 Wend. 103, 104, per Paige. 2 Fonb. Eq. B. 2, pt. 2, ch. 2, § 1 and notes.

[2] Ex parte Skinner, J. B. Moore's R. 278; of McClellan, 1 Dowling's Prac. Cas. 81; of Ball and Ball, 2 Sim. 35; of the King v Greenhill, 4 Ad. & Ellis, 624.

[3] Bac. Abr. tit. Guardians, A.; of guardians by statute, 1 Mad. Ch. Pr. 364.

[4] Mendes v. Mendes, 3 Atk. 625.

[5] 1 K. & R. 181. 1 R. L. of 1813, 368.

[6] 2 R. S. 150.

against every person claiming the custody or tuition of such minor, as guardian in socage or otherwise.[1]

This right of the father extends only to the appointment of a guardian for his legitimate children, and not to a *natural child*, or to a grand child,[2] or to one with respect to whom he stands in *loco parentis*. The power of appointment of a guardian is not conferred upon the mother, though the father be dead. In such a case, indeed, she is the guardian by nature, but in that character has no right to the personal estate of her child. The guardianship extends only to the person.[3] Though a grandfather has no right to appoint a guardian for his grandchild, yet, as was said by Lord Hardwicke, he may give his estate upon such condition as he pleases; and there are instances where the grandfather has given his estate to a grandchild, and appointed guardians of his estate and person; and if the father did not submit to the will, the court has made the father's opposition work a forfeiture of his son's estate.[4]

There were at common law three kinds of guardianship; guardian by nature, guardian by nurture, and guardian in socage.[5] Guardian by *nature* is the father, and on his death the mother.[6] This guardianship continues to the age of twenty-one years of the child, and extends only to the custody of the person. Guardian by *nurture* occurs only when the infant has no other guardian, and belongs exclusively to the parents, first to the father and then to the mother, and terminates when the infant arrives at the age of fourteen years, in the case of both males and females. As it is concurrent with guardianship by nature, it is in effect merged in the more durable title of guardian by nature.[7] Guardian in socage extends both to the lands and the person of the infant.[8] It applies only to such lands as he acquires by descent; and the common law gave this guardianship to the next of blood of the infant to whom the inheritance could not possibly descend. This guardianship ceases when the child arrives at the age of fourteen, unless he fails at that time to select another guardian, in which latter case it extends till the infant arrives at the age of twenty-one years. This guardianship in socage cannot arise unless the infant is seised of lands held in socage. It has gone into disuse, and can

[1] 2 R. S. 150, § 2.

[2] Fullerton v. Jackson, 5 J. Ch. R. 278.

[3] Hyde v. Stone, 7 Wend. 354. Genet v. Talmadge, 1 J. Ch. R. 3.

[4] Blake v. Leigh, Ambl. 306. 5 J. Ch. R. 278.

[5] Combs v. Jackson, 2 Wend. 153. Fonda v. Van Horne, 15 id. 631. Hyde v. Stone, 7 id. 354. 2 Fonb. B. 2, pt. 2, ch. 2, § 2, n. h.

[6] Co. Litt. 88 b.

[7] Id.

[8] Byrne v. Van Hoesen, 5 J. R. 66. Jackson v. Vredenberg, 1 id. 159, 163 Jackson v. De Walts, 7 id. 157.

hardly be said to exist in this country. The substitution of allodial for socage tenures, and the change of the law of descent, would seem to be incompatible with guardianship in socage.[1] Nevertheless it has been provided by the Revised Statutes, that where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in socage, shall belong, 1st to the father of the infant; 2d, if there be no father, to the mother; 3d, if there be no father or mother, to the nearest and eldest relative of full age, not being under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred. To every such guardian, all statutory provisions that are or shall be in force, relative to guardians in socage, shall be deemed to apply. But it is further provided, that the rights and authority of every such guardian shall be superseded in all cases when a testamentary or other guardian shall have been appointed under the provisions of the third title of the eighth chapter of part second;[2] that is, by the deed, or last will of the father of the infant, or in default thereof, by the surrogate of the county where the minor resides.

There are, in truth, now but two kinds of guardians in this state—one by common law, and the other by the statute. The guardian by statute, is that appointed by the deed or last will of the father, or in his default, by the surrogate of the county where the minor resides.[3] The surrogate has no jurisdiction to appoint a guardian for an infant in the lifetime of the father; nor has he a right to appoint against the nomination of the infant if he be of the age of fourteen years, or upwards;[4] nor without notice to the relatives of the infant if he be under the age of fourteen years, and there be any relatives residing in the county where the application is made.[5] His power is essentially one of exclusion, if the nomination be deemed unsuitable, whether it be made by the minor or his relatives.

The guardian appointed by the surrogate has the same power as is possessed by a testamentary guardian. And the surrogate, having acquired jurisdiction of the subject, has the same power to allow and appoint guardians, as was possessed by the chancellor, and as is now possessed by the supreme court, to which the general chancery jurisdiction has been assigned by the constitution.[6]

[1] Const. 1846, art. 1, §§ 12, 13. 1 R. S. 718.

[2] 1 R. S. 718. 2 id. 150.

[3] 2 R. S. 150.

[4] Sherman v. Ballou, 8 Cowen, 304.

[5] 2 R. S. 150, § 5. Morehouse v. Cooke, 1 Hopk. 226. Underhill v. Dennis, 9 Paige, 202.

[6] 2 R. S. 151, § 6. Quere, whether he has a right to appoint against the nomi-

The mode of practice before the surrogate in this respect, and of appeal from his orders to the supreme court, belong to treatises of another kind. It may be proper to add, that for greater caution the legislature have declared that every guardian in socage, and every general guardian, whether testamentary or appointed, shall safely keep the things that he may have in his custody belonging to his ward, and the inheritance of his ward, and shall not make or suffer any waste, sale or destruction of such things, or of such inheritance, but shall keep up and sustain the houses, gardens, and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his hands, and shall deliver the same to his ward, when he comes to his full age, in as good order and condition at least, as such guardian received the same, inevitable decay and injury only excepted; and he shall answer to his ward for the issues and profits of real estate, received by him, by a lawful account.[1] The guardian who makes or suffers any waste, sale, or destruction of the inheritance of his ward, shall lose the custody of the same and of his ward, and shall forfeit to the ward treble damages.[2]

The various species of guardian which have been mentioned, have been superseded, in practice, by the guardian appointed by the court of chancery, in this state, and since 1846, by the supreme court under its chancery powers, or by the guardian appointed by the surrogate, or by testamentary guardians. The latter are not very common; and although the surrogate's court affords a convenient jurisdiction for the appointment of guardians, and the bringing them to account, in the cases falling within its province, yet the jurisdiction of the supreme court, as a court of equity, possessing the general jurisdiction of the late court of chancery, over minors and their estates, is the most fit tribunal for the exercise of this authority. Its power in this respect is general, and has been long and unquestionably settled.[3]

It is owing to this general jurisdiction that the late court of chancery, and now the supreme court, may discharge or change a guardian appointed by the surrogate, or a testamentary guardian appointed by the father.[4]

nation of the minor? Sherman v. Ballon, 8 Cowen, 304, which arose under the act of 1813, (1 R. L. 454, § 30,) and which did not contain the provision of 2 R. S. 151, § 6. White v. Pomroy, 7 Barb. 640.

[1] 2 R. S. 153.

[2] Id.

[3] De Manneville v. De Manneville, 10 Ves. 63. Eyre v. The Countess of Shaftsbury, 2 P. Wms. 118.

[4] Ex parte Crumb, 2 J. Ch R. 439. Matter of Andrews, 1 id. 99.

It has been repeatedly held that such guardians are as much under the superintendence of a court of equity as a guardian in socage.[1]

The ground on which courts of equity act, in these cases, is upon its general jurisdiction over infants and their estates, and upon the doctrine of trusts. A guardian, by whomsoever appointed, is but a trustee, and in that character is amenable for a breach of trust to the court of chancery, and, like other trustees, liable to be displaced, and to have another appointed in his stead.[2] Independently of the statute, the surrogate has no jurisdiction over the guardian, appointed by him, as a trustee, but he is clothed with authority by the Revised Statutes to call him to account, and to remove him for misconduct or incompetency, and to appoint another.[3] The supreme court has jurisdiction in this matter, at common law, and independently of the statute, whether the guardian be appointed in the one way or the other.

The insolvency of the guardian and of one of his sureties, has been held to be a sufficient cause for his removal.[4] So, it seems, is a gross mismanagement of the trust estate. Intemperance of the guardian is also a good ground for his removal.[5]

A guardian has the legal power to sell or dispose of the personal estate of his ward, in any manner he may think most conducive to the purposes of the trust; and a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust, nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information at the time, that the guardian intended to misapply it, or was in fact, by the very transaction, applying it to his own purposes.[6]

With respect to the real estate of the ward the rule is different. The guardian has no power or control over it, farther than as concerns the rents and profits.[7] He may lease the lands of his ward, during his minority, but no longer.[8] He cannot, without leave of a court of equity, change the nature of the estate, by turning real estate into personal, or personal into real.[9]

The trust of the guardian is not satisfied by the mere preservation of

[1] Beaufort v. Berty, 1 P. Wms. 704. Eyre v. Countess of Shaftsbury, 2 id. 107. Wellesley v. Beaufort, 2 Russ. Ch. R. 1.

[2] Beaufort v. Berty, 1 P. Wms. 704. Frederick v. Frederick, id. 721. 1 R. S. 730, § 70. Disbrow v. Henshaw, 8 Cowen, 349.

[3] Matter of Andrews, 1 J. Ch. R. 99. 2 R. S. 152, §§ 12, 14–17.

[4] Matter of Cooper, 2 Paige, 34.

[5] Kettletas v. Gardner, 1 Paige, 488.

[6] Field v. Schieffelin, 7 J. Ch. R. 150.

[7] Genet v. Talmadge, 1 J. Ch. R. 561 2 R. S. 153, § 20.

[8] Pond v. Curtis, 7 Wend. 45.

[9] Id. 7 J. Ch. 154. Inwood v. Twyne Ambl. 419.

the property of the ward, with its accumulations. While it is his duty to keep the money of his ward where it will be productive, and to apply the interest only, if sufficient, to his maintenance and the proper expenditure of the trust,[1] he should not support his ward in idleness, when he is capable of earning his own living,[2] unless he is preparing for future usefulness by obtaining an education.[3] This rule depends much on the social position, wealth and prospects of the ward.

The parent or guardian has the right to change the domicil of his child or ward, provided such change is in good faith; but this right is subordinate to that of the court of chancery to prevent an improper removal of an infant out of the state. The court, however, will not interfere with the natural right of a parent over his child, except in a very special case.[4] Where a father appointed a testamentary guardian for his children, who were all under the age of seven years, and directed the guardian to remove them to the state of Ohio, and to invest their property there upon certain trusts which were illegal by the laws of New-York where the children were residing with their father at the time of his death, and the widow refused to go with them to the state of Ohio, and asked to have them remain with her in this state, the court restrained the guardian from taking the children from their mother, and removing them out of the state, until further order.[5]

Where a testamentary guardian holds a fund for the sole benefit of his wards, in his character of guardian, to be invested for their use, the court of chancery may change the investment from that which is directed by the testator, where it is for the benefit of the infants that such change should be made, even without the consent of such guardian.[6]

From the relation that the guardian stands to his ward, it is obvious that the interest of the latter would not be safe if dealing with the trust property by the guardian were not viewed with jealousy. We have shown elsewhere that the trustee cannot make purchases where his interests and duty conflict. And the cestui que trust has a right to affirm the sale and hold the trustee to his bargain, or to disaffirm it and have the property resold. The same rule applies to the relation of guardian and ward.[7]

While the guardian is thus prevented from speculating in the trust estate for his own benefit, and was formerly deprived of all compensation,

[1] De Peyster v. Clarkson, 2 Wend. 77. Roberts v. Jackson, 3 Yerg. 77.
[2] Clark v. Clark, 8 Paige, 158. 2 Fonb. Eq. B. 2, pt. 2, ch. 2, § 3.
[3] Id.
[4] Wood v. Wood, 5 Paige, 596.
[5] Id.
[6] Wood v. Wood, 5 Paige, 596.
[7] Ante, 186, 607.

except a mere indemnity for his expenses, the Revised Statutes have since allowed to him, in addition to his expenses, the same rate of compensation that is allowed to executors and administrators.[1]

2. We proceed now to consider the doctrine of courts of equity with respect to the *maintenance* of infants. This subject may be considered with reference to the power of the court at common law, and its power under the statute.

It is laid down, as a general rule, that a parent at common law is under a natural obligation and duty to furnish necessaries for his infant children, and has a correspondent right to their services while such support is afforded.[2] The law of nature, which requires the parent thus to support his infant offspring, designates his own house as the place where that duty shall be performed.[3] Hence, where the parent is willing to support his infant child, and a relative without his request, but with his assent, receives his child into his family and supports it as a child of his own, no agreement of the father to pay for such support can be implied.[4] It has been doubted whether, independently of the statutes on the subject, there is any *legal* obligation on the parent to maintain his child, and whether a third person affording a support to the child, can maintain an action against the parent for reimbursement, except upon the ground of contract, express or implied.[5]

If the child be of an age sufficient to maintain himself, and be in perfect health, the court of chancery will not compel the parent to furnish means for the professional education of the infant.[6]

The cases in which the court of chancery interferes, with respect to the maintenance of infants, are where the infant himself possesses property which may be reached by the court, or where there is a specific fund for maintenance. Even in these cases, if the father is sufficiently competent, the court will give no direction with regard to the infant's maintenance out of his own estate, during the life of the father, unless the circumstances of the case be peculiar.[7] The circumstances which will induce the court to break in upon the property of the infant for his support, during the life of the parent, are, that the parent is totally incapable,

[1] 2 R. S. 153, § 22. Id. 93, § 58. McWhorter v. Benson, Hopk. 28.

[2] Raymond v. Loyl, 10 Barb. 484. In the matter of Ryder, 11 Paige, 187. Butler v. Butler, 3 Atk. 60.

[3] Chilcott v. Trimble, 13 Barb. 502.

[4] Id. Van Valkenburgh v. Watson, 13 J. R. 480.

[5] Raymond v. Loyl, 10 Barb. 483.

[6] In the matter of Ryder, 11 Paige, 188.

[7] Jackson v. Jackson, 1 Atk. 515.

from poverty; or from the number of his children he is bordering upon necessity, and the child is in danger of perishing from want.[1]

It was said on one occasion, by Lord Hardwicke, that where a legacy is given to a child by a relative, the father cannot make use of it in the maintenance of such child, but must provide for him out of his own pocket. Nor can he set him out in the world, or put him out an apprentice, or clerk, with the money arising from the legacy, and if he does so it shall not be allowed to him.[2]

Under what circumstances, or in what manner, and to what extent, the *principal* of a sum devised to children, after the death of their mother, to whom the *interest* was payable during life, will be broke in upon, and directed to be paid, by the executors, for their present maintenance and education, being infants, and also for the discharge of debts contracted by the mother for their *past* maintenance, was considered and discussed by Chancellor Kent; and he came to the conclusion that where the sum devised was small, the principal might be applied, if necessary; otherwise the interest only.[3] He further held that a retrospective allowance for maintenance was admissible, contrary to some early cases before Lord Thurlow, who subsequently changed his opinion.[4] And Chancellor Walworth, in a more recent case, said, that to entitle the father even to an inquiry as to the *propriety* of making an allowance for *past* support, he should state a special case, showing the extent of his means at the time such support was furnished, and the particulars of the extraordinary expenditures for the actual benefit of the infant, which created an equitable claim in his favor.[5] The application therefore is not, it should seem, a matter of course, but depends on the peculiar circumstances of the case.

The ground on which courts of equity interfere, and make allowances in matters of this kind, is the general good of the infant; and the power of the court, in this respect, springs from its general jurisdiction over infants and their estates. It is a settled principle of the court of chancery, said the chancellor, in a recent case,[6] "not to allow maintenance on

[1] Butler v. Butler, 3 Atk. 60. Cudworth v. Thompson, 3 Desaus. 258.

[2] Darley v. Darley, 3 Atk. 399.

[3] Matter of Bostwick, 4 J. Ch. R. 100. Harvey v. Harvey, 2 P. Wms. 21. Barlow v. Grant, 1 Vern. 255. Walker v. Wetherell, 6 Ves. 474. McDowell v. Caldwell, 2 McCord's Ch. R. 58. Teague v. Dendy, 2 id. 211. Sweet v. Sweet, Speer's Eq. R. 309. Long v. Norcom, 2 Iredell's Eq. R. 354. In the matter of Burke, 4 Sandf. Ch. R. 617.

[4] Matter of Bostwick, 4 J. Ch. R. 104. Session v. Shaw, 9 Ves. 285. Chalmers v. Goldwin, 11 Ves. 1. Maberly v. Turton, 14 Ves. 499.

[5] In the matter of Kane, 2 Barb. Ch. R. 380. Ex parte Bond, 2 Myl. & K. 439.

[6] Matter of Kane, supra.

behalf of infants, out of their property, unless it will be for their benefit to order such allowance. And it is not for the benefit of the infants to direct an allowance out of their general estate when they have any other sufficient provision for their maintenance, or a right which can be enforced, to demand it from other sources. The court, therefore, will not direct an allowance to the father of the infants out of their estate, when he is of sufficient ability to maintain and bring them up without it, in reference to their situation and prospects in life; having a due regard to the claims of others upon his bounty." Lord Eldon said, in a celebrated case, towards the close of his judicial administration, "The court considers the duty of the father imposes thus much upon him, that if he be himself of ability to maintain his children and to provide for them according to their expectations, be their fortunes what they may, it says you shall provide for them out of your own means, and not encroach upon the property of the children."[1]

There is a qualification of this rule which Lord Eldon notices in the same case, that where the court takes away from the father the care and custody of his children, it is not in the habit of calling, in aid of their own means, the property of the father.[2] But this supposes their own means to be ample.

An allowance for maintenance will not be made until that which has been provided by the testator has been exhausted. Thus, where a testator bequeathed an annuity to his widow, during the minority of his children, together with a distributive share of his estate, after that period, in lieu of dower, and for the further purpose, and upon the express trust, that she should take care of, educate and maintain the children during their minorities, it was held that the court was not authorized to order a further allowance to be made out of the infants' estates to the widow, for their support, until the fund bequeathed to her for that purpose was exhausted.[3]

Maintenance for infants can only be allowed by the court out of funds belonging to them. It cannot be charged upon the property of other persons. But where a fund is given absolutely to several infants as a class, with the benefit of survivorship, if either of them dies before the time appointed for the distribution of the fund, as the chance of survivorship is equal, the court may allow maintenance out of the fund, for the

[1] Wellesley v. Beaufort, 2 Russ. R. 28. [3] Matter of Davidson, 6 Paige, 136.
[2] Id.

benefit of the infants equally, while all who are interested therein continue to be minors.[1]

The husband is not bound to maintain his wife's children by a former husband,[2] nor is the mother, married to a second husband, obliged to maintain the children by her first husband; but is entitled to an allowance for maintenance from the interest of their fortunes.[3]

The cases which have been considered, are where the order for maintenance has been made out of the *income* of the infant's property; or where the capital of his *personal* property has been broken into. Independently of the statute, the court of chancery had no power to direct the sale of infants' real estates for their support, education or maintenance.[4]

The necessity of reaching the real estate of infants for their own support was often felt, and occasional relief was granted by special acts of the legislature, applicable only to particular cases. These applications becoming frequent, the legislature, at length, in 1814, passed a law, authorizing the chancellor, upon the application by petition of an infant by his next friend, or of the guardian of such infant, to direct a sale of the real estate of the infant, if he should deem it proper, for the maintenance or education of such infants.[5] In the following year,[6] the power was so enlarged as to authorize the court, on a like application, to direct a sale, if it should satisfactorily appear to the chancellor that the interest of the infant would be promoted thereby; but it provided that nothing contained in the act should authorize the sale or disposition of any lands or term, against the provisions of any last will or conveyance. Under these statutes, the chancellor held, in 1824, that a sale of real estate should not be ordered on account of an expectation of an increased income, but there should be some special reasons showing the propriety of the sale.[7] This led to a modification and increase of the power devolved upon the court; and in the revision of 1830 it was enacted, that whenever it shall appear satisfactorily that a disposition of any part of the real estate of such infant, or of his interest in any term for years, is necessary and proper, either for the support and maintenance of such infant, or for his education; or that the interest of such infant requires, or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste and dilapidation, or on account of its being

[1] Ex parte Kebble, 11 Ves. 604. Errat v. Barlow, 14 id. 202. Turner v. Turner, 4 Sim. 430.

[2] Gay v. Ballou, 4 Wend. 403.

[3] Billingsley v. Critchet, 1 Bro. C. C. 268.

[4] Rogers v. Dell, 6 Hill, 415. Baker v. Lorillard, 4 Comst. 266.

[5] L. 1814, p. 128.

[6] L. of 1815, p. 103.

[7] Matter of Mason, Hopk. 122.

wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale or other disposition of such real estate or interest, to be made by such guardian o guardians so appointed, in such manner, and with such restrictions, as shall be deemed expedient.[1] A subsequent section forbids the sale or other disposition against the provision of any last will, or of any convey ance by which such estate or term was devised or granted to such infant.

The jurisdiction over such sales was originally given to the chancellor alone. Under the constitution of 1821, the same power was conferred on the circuit judges and vice chancellors. The constitution of 1846, having abolished those courts, vested the same jurisdiction in the supreme court, with power in the legislature to confer upon the county judge, equity jurisdiction in special cases. And by the Code of Procedure, the sale, mortgage, or other disposition of the real property of an infant, situ ated within the county of the county judge, is made a part of the juris diction of that office.[2] So that the county judge exercises in his own county concurrent jurisdiction with the supreme court, over this subject. From the multitude of officers to whom this jurisdiction is intrusted, there is great danger that a laxity of practice will prevail; and there certainly cannot be the same uniformity in the proceeding, as when the whole was supervised by a single tribunal.

3. We proceed next to notice the jurisdiction of equity over the *marriage* of the infant wards of the court.

This jurisdiction has, in England, given rise to numerous cases, and it appears that courts of equity there entertain no greater jealousy, nor show more resentment against any thing, than the unlawful marriage of infants.[3] According to their practice, when an infant is committed by the court to the custody or care of any one, such committee gives a recognizance, that the infant shall not marry without leave of the court, which form is very rarely altered, and then, on special circumstances; so that if the infant marry, though without the privity, or knowledge, or neglect of the committee, yet the recognizance is, in strictness, forfeited whatever favor the court, upon application, may think fit to show to such committee, when he appears not to have been in fault.[4] No sureties appear to be given, but as the recognizance binds the lands of the guar

[1] 2 R. S. 195, § 175.

[2] Const. 1846, art. 6, § 14. Code, § 30, sub. 6.

[3] Eyre v. Countess of Shaftsbury, 2 P Wms. 111.

[4] Id. 112. Dr. Davis' case, 1 P. Wms 698.

dian, from the time of its enrollment, it is probably an ample guaranty In this state no such recognizance is required of the guardian appointed by the court of chancery. The practice in the late court of chancery, as prescribed by the rules of the court, was to require from the general guardian of an infant appointed by the court, a bond in a penalty of double the amount of the personal estate of the ward, and of the gross amount or value of the rents and profits of the real estate during his minority, together with at least two sufficient sureties, each of whom should be worth the amount specified in the penalty of the bond, over and above all debts; or instead of personal security, the guardian might give security by way of mortgage on unincumbered real property, of the value of the penalty of his own bond only. But the court, in its discretion, might vary the security, where, from special circumstances, it migt be found for the interest of the infant.[1] The condition of the bond in the time of Chancellor Kent and subsequently was, that the guardian should faithfully and justly perform his trust as such guardian, and duly observe such orders as the chancellor should make in the premises in relation to such trusts.[2] The condition of the bond of the guardian appointed by the surrogate is, that he will faithfully in all things discharge the duty of a guardian to such minor according to law, and that he will render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required.[3]

Although the form of the security given by the guardian, on his appointment, does not indicate that the ward shall not be permitted to marry without the leave of the court, yet the reasons, in other respects adverse to such marriage, exist here as well as in England; and the jurisdiction of the court, to prevent the improper marriage of the ward, and to punish those who contribute to bring about such marriage, is unquestionably a part of our jurisprudence.[4] This seems to have been conceded by Chancellor Kent on several occasions.[5] In one case an infant, under the age of 12 years, ignorant of the duties which the marriage if legal would impose, and considering the matter as a frolic, agreed to marry the defendant, a man of the age of 23 or 24 years, and the marriage ceremony was performed by a Baptist clergyman the same day. The infant

[1] Rule 148 of Chancellor Walworth.

[2] Hoffman on Master, 133, 370. Blake's Ch. Pr. 328 et seq.

[3] 2 R. S. 151, § 8.

[4] Van Duzer v. Van Duzer, 6 Paige, 366. Udall v. Kenney, 5 J. Ch. R. 464; S. C. in Error, 3 Cowen, 590.

[5] Aymar v. Roff, 3 J. Ch. R. 49. Udall v. Kenney, 3 Cowen, 590.

then returned to her mother, and being informed of the duties of the marriage state, and what it was in her power to do, immediately declared, in the presence of a master in chancery, her dissent from the marriage, and her unwillingness to be bound by it, and her election to live under the protection of the plaintiff; and this declaration was reduced to writing and signed by the infant, and attested by the master and others. This declaration was shown to be voluntary and uninfluenced by her parents or others, and was repeated in court, and the marriage disavowed. No meeting, or intercourse of any kind, had taken place between the infant and the defendant. On a bill filed for that purpose, the infant, after an examination in open court, was placed under the protection of the court, as a ward thereof, and the defendant was ordered to refrain from holding any conversation, or from any intercourse, or correspondence, with the said infant, as long as the order remained in force, under the pain of incurring a contempt. As no further order was asked in the case, nothing further was done; but it appears, by the report, that the chancellor acted upon the doctrine of Lord Hardwicke, in Eyre v. Countess of Shaftsbury, already cited.[1]

On another occasion, before the same learned chancellor, on an application under the act of April, 1814,[2] and of March, 1815,[3] for the sale of the real estate of a married infant female, the chancellor held that the acts in question were not applicable to the sale of the real estate of the infant wife, as it was never the practice of the court to appoint a guardian to an infant feme covert. The guardianship of the daughter, he observed, determines with her marriage; and there was no instance in which a guardian had been appointed to a female infant after marriage.[4] And he intimated a concurrence of opinion with Lord Eldon, that a female ward of the court was not discharged, upon her marriage, from the protection of the court, without a special order to that effect.[5]

Though, as intimated by Chancellor Walworth, the guardianship of the infant wife belongs to the husband, it by no means follows that an infant female, a ward of the court, may marry without its consent.[6]

The occasions for the interference of the court of equity in relation to the marriage of wards of the court have, in this country, been rare. But the necessity of the jurisdiction, and the policy of the exercise, are the same in all countries, where a due regard is had to the marriage relation. In

[1] 2 P. Wms. 111, 102.

[2] Sess. 37, ch. 108.

[3] Sess. 38, ch. 106.

[4] Matter of Whittaker, 4 J. Ch. R. 380. Lord Shaftsbury's case, 1 Ves. 160.

[5] Mendes v. Mendes, 3 Atk. 625. Belt's Sup. 86, 87. Matter of Whittaker, 4 J. Ch. R. 380.

[6] In the matter of Van Cott, 1 Paige, 489.

England it is of frequent occurrence. Lord Eldon remarked in Wellesley v. Beaufort, in 1827, that a case came before him not long before, in which an infant of a considerable family, the representative of a very old baronet, was about to be entrapped into a marriage with a young woman, the daughter of a common bricklayer; the court would not allow that to take place, and stopped the marriage.[1] The paternal care of the court is sometimes as essential for the protection of the male, as it more frequently is, for that of the female ward.

The effect of marriage at common law, upon the personal estate of the wife, presents strong considerations in favor of the interposition of the court in favor of its infant female ward. Accordingly, in England, where infants under the care of the court are upon a treaty of marriage, the consent of the court ought to be obtained. When applied to for this purpose, the court generally makes a reference to a master, to see whether the settlement proposed is proper; and if it is found to be improper, the court will not give the infant leave to marry.[2]

The jurisdiction, in cases falling within it, is invariably exercised for the benefit of the ward. When a lady having property in court, marries after she is of age, the court does what it can to obtain a proper provision for her; having, as there is no contempt committed, no means of enforcing a settlement, if the husband does not seek to lay his hands upon the property; but if the marriage is a contempt, the court, vindicating its jurisdiction, is enabled by imprisonment to compel the husband to make a proper settlement.[3]

In considering a question of a contempt for marrying a ward of the court without leave, the court acts upon a distinction between an unsuitable match brought about for the sake of the property of the ward, and such an one as is between persons of equal rank and condition. In the first case, should a beggar marry the ward, for the sake of her fortune, the court would not permit him to touch it. But if the marriage, though against the rules of the court, brings together persons of equal rank and fortune, and as considerable a settlement is made by the one as by the other, the equivalent provision made by the husband will be taken into consideration by the court in administering its animadversion.[4] The usual settlement seems to be, to settle one-fifth of the dividends and interest of the property upon the husband, and the residue upon the wife, for her sole and separate use, during their joint lives, with a clause to prevent anticipation, and a power to the wife to give another fifth to the hus-

[1] 2 Russell, 14.
[2] Smith v. Smith, 3 Atk. 305.
[3] Ball v. Coutts, 1 Ves. & B. 299.
[4] Id. 303.

band by will; the residue subject to a provision for maintenance, to accumulate, and with the principal to go to the children at the ages of twenty-one or marriage; a power to the wife to charge, by way of appointment to each child, a share not exceeding the share of each child by the first marriage. In case of no children, the husband surviving, the limitation is, in default of appointment, to her next of kin, exclusive of the husband.[1]

SECTION II.

OF MARRIED WOMEN: AND HEREIN, OF DIVORCE, ALIMONY, &c.

IN the former part of this treatise, while discussing the doctrine of trusts in mariage settlements, we showed the effect of the marriage, at common law, upon the property of the wife; and the rights created and duties imposed upon the husband by means of that relation. And it was shown that courts of equity, through the medium of the doctrine of trusts, preserved the property of married women during coverture to their separate use, without the control of their husband, and beyond the reach of the husband's creditors.[2] And it was intimated that some other branches of the same subject would fall more naturally under our consideration, when we came to treat of the protection which courts of equity afforded to married women, against the disabilities imposed by the strict rules of the common law.

Courts of equity, while they fully recognize the marital rights of the husband at law, treat the husband and wife as distinct persons, having capacity, to a certain extent, of contracting with each other, of holding property separate and distinct from each other, and as capable of suing and being sued by each other.

The most important of these rights is that which maintains, in favor of the wife, notwithstanding her coverture, the dominion over her property as a feme sole, with a right of disposition over it during her life, and of transmitting it at her death to the varied objects of her regard, by a last will and testament. The power thus to hold property, real and personal, to her own separate and exclusive use, is often, and perhaps generally,

[1] 1 Mad Ch. Pr. 280, 281. Chassaing v. Parsonage, 5 Ves. 17. 4 id. 386. 5 id. 398. 8 id. 74. 2 Fonb. Eq. B. 2, pt. 2, ch. 2, § 1 and notes.

[2] Ante, CHAP. VII, Sec. 4, p. 472 et seq.

reserved to her by the marriage articles, or by an actual settlement made before marriage; and in that case, the terms of the agreement regulate the rights, interests and duties of the respective parties. In like manner, property, real or personal, may be secured to a married woman, for her separate and exclusive use, after marriage; or it may come to her by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and under the statute, be held to her sole and separate use, with a right on her part to convey and devise the same.[1] Through the aid of a court of equity, or without the intervention of trustees, her rights are now fully protected, for equity suffers no right to fail for the want of a trustee, but will appoint a trustee, or hold that the husband is the trustee for his wife.[2]

It is proposed now to treat briefly, in the first place, of the equity of the wife to a provision in her favor, out of her property, not secured by any marriage settlement, but which the husband cannot reach but through the aid of a court of equity; and afterwards to notice some other points in which the rights of married women are protected by the mode in which that court treats the relation of husband and wife.

The principle was stated by Chancellor Kent, in an early case before him, that where the aid of a court of equity was requisite to enable the husband to take possession of the wife's property, he must do what is equitable, by making a reasonable provision out of it for her maintenance and that of her children, and without that, the aid of the court would not be afforded. The practice was stated to be, for the husband, on a reference, to make proposals of a settlement before a master, and on the coming in of his report, the court judged of its sufficiency.[3] In the case before him, the father of the plaintiff's wife died intestate, leaving five children and a large real and personal estate. The bill prayed that the defendant might account and pay over to the plaintiff the amount belonging to his wife. From the report of the master it appeared that there was a considerable sum in the defendant's hands belonging to the plaintiff's wife as one of the distributees; that the plaintiff was a mariner and poor; that the wife lived harmoniously with him, and was supported by him when he was able, but that he was then out of employment, and she desired the money to remain in the hands of the defendant, who was her brother, where it was safe. The chancellor directed that $1000 be

[1] L. of 1848, p. 307. L. of 1849, p. 529. 354. Mad. Ch. Pr. 376. Strong v. Skinner, 4 Barb. 546.

[2] Blanchard v. Blood, 2 Barb. S. C. R.

[3] Howard v. Moffat, 2 J. Ch. R. 206.

secured for the wife and her child, and that the residue, nearly as much more, be paid over to the husband.

The rule it seems is the same, whether the husband applies to the court himself, or a suit for the wife's debt, legacy, portion, &c. is brought by his legal representatives. The extent of the provision will depend on the circumstances of the case.

It was in the same case stated, that if the husband could lay hold of the property without the aid of a court of equity, he might do so, as the court had not the means of enforcing a settlement by interfering with his remedies at law.[1] This doctrine has been subsequently repeated.[2]

The doctrine thus expounded by the chancellor was well settled in England to the same effect, for above a century,[3] and has been repeatedly acted upon in this state.[4]

It may be well, before adverting to the acts of 1848 and 1849, for the more effectual protection of the property of married women, to notice, more at large, the doctrine with respect to the wife's equity existing antecedently to those statutes.

This jurisdiction of courts of equity was first assumed in cases where it was necessary for the husband, or those claiming under him, to apply to the court for assistance in order to obtain possession of the property of the wife; which assistance the court, acting upon the maxim, that he who asks equity must do equity, withheld, until an adequate settlement was made.[5] In consequence of this origin of the jurisdiction, it was thought that the equity of the wife to a settlement was confined to those cases in which the husband, or those claiming under him, were plaintiffs. But ever since the commencement of the present century, this restriction upon the jurisdiction has been exploded, and the wife has been permitted *actively* to assert her equity as plaintiff.[6] In a recent case, a married woman who had left her husband, and was living separate from him, but

[1] Howard v. Moffatt, 2 J. Ch. R. 208.

[2] Udall v. Kenney, 3 Cowen, 591.

[3] Oxenden v. Oxenden, 2 Vern. 494. Bosvill v. Brander, 1 P. Wms. 459. Jacobson v. Williams, 2 id. 382. Adams v. Pierce, 3 id. 13. Brown v. Elton, id. 202. Grey v. Kentish, 1 Atk. 280. Jewson v. Moulson, 2 id. 417. Burdon v. Dean, 2 Ves. jr. 607. Oswell v. Probert, id. 680. Brown v. Clark, 3 id. 166. Lumbe v. Milner, 5 Ves. 517. Ball v. Coutts, 1 Ves. & B. 300. Murray v. Elibank, 13 Ves. 1.

[4] Turrell v. Turrell, 2 J. Ch. R. 391. Van Epps v. Van Dusen, 4 id. 64. Drummond v. Magee, id. 318. Udall v. Kenney, 5 id. 464. 3 Cowen, 590. Glen v. Fisher, 6 J. Ch. R. 33. Haviland v. Myers, id. 25. Same v. Bloom, id. 178. Carter v. Carter, 1 Paige, 463. Smith v. Kane, 2 id. 303. Van Duzer v. Van Duzer, 6 id. 366. Martin v. Martin, 1 Comst. 473.

[5] Bosvill v. Brander, 1 P. Wms. 459.

[6] Lady Elibank v. Montolieu, 5 Ves. 737. Sturgis v. Champneys, 5 Myl. & C. 105. Eedes v. Eedes, 11 Sim. 569 Hanson v. Keating, 4 Hare, 6.

not in a state of adultery, was held to be entitled to a settlement out of a sum of stock to which her husband had become entitled in her right. The action was brought by her in her own name, against her husband and the trustees, in whom the stock was vested.

The equity of the wife to a settlement is binding, not only upon her husband, but also upon his assignees in bankruptcy, under the insolvent debtor's act, or under a general assignment for the payment of his debts.[1] And, notwithstanding the doubts once expressed on the subject, her equity is superior to that of the assignee of the husband for valuable consideration.[2]

Originally this jurisdiction of courts of equity was extended in favor of the wife, with respect only to her *equitable* property, which could be reached by her husband, or those claiming under him, in no way except through the medium of the court. The principle was afterwards expanded so as to embrace all the property of the wife, whether legal or equitable, which was the subject of action, or over which the court had acquired jurisdiction.[3]

It is also a part of the doctrine on this subject, that whenever a woman insists upon her equity to a settlement, it will always be extended to her children.[4] In the leading case on this subject, the right of the children to a provision out of the property of their mother, under a decree directing a settlement to her and her children, was upheld by the court, notwithstanding the death of the mother before the report of the master, no act having been done by the mother to waive the equity.[5] All the cases show that where a settlement is made upon the wife, her children are embraced within it. Nevertheless, the equity to a settlement is strictly personal to the wife. If, therefore, she dies before asserting it, her children cannot insist upon a settlement. She may also, at any time before the settlement, waive her right to it, and thus defeat the interests of her children.

The children have no equity of their own. Their equity is obtained through the consent of the mother. It is against the father that the court

[1] Jewson v. Moulson, 2 Atk. 420. Burdon v. Dean, 2 Ves. jr. 607. Sturgis v. Champneys, 5 Myl. & Cr. 97. Van Epps v. Van Dusen, 4 J. Ch. R. 64. Haviland v. Myers, 6 id. 25. Mumford v. Murray, 1 Paige, 620.

[2] Macaulay v. Philips, 4 Ves. 19. Wright v. Morley, 11 Ves. 12. Udall v Kenney, 3 Cowen, 607, 608.

[3] Milner v. Colmer, 2 P. Wms. 639. Sturgis v. Champneys, 5 Myl. & Cr. 97. Hanson v. Keating, 4 Hare, 1. Haviland v. Bloom, 6 J. Ch. R. 178.

[4] Howard v. Moffat, 2 J. Ch. R. 206. Udall v. Kenney, 3 Cowen, 591. 608.

[5] Murray v. Lord Elibank, 13 Ves. 1.

exercises jurisdiction to exclude him from those rights which the law would otherwise give him; and then the court deals with those rights as between the mother, whose property it is, and as between the children of the marriage, in such a way as may be thought for the interests of the family.[1]

In all cases the equity of the wife is personal, and it arises upon the vesting of the legacy in her. It may be defeated by a voluntary payment by the executors to her husband, who has a legal right to receive it and give a discharge for it. If the payment is to be made through the medium of the court, her equity will be enforced, if she desires it, but not otherwise. She may abandon it, in which case her children can claim nothing; and if she claims it for herself, the court requires the benefit to be extended to her children. Her equity and the equity of her children are treated as one equity, to be enforced or not at her option.[2]

But suppose the wife dies, leaving children, before the decree, but after the claim to a settlement has been allowed: The question will then arise between the husband, or those succeeding to his rights, and the children. In such a case, the right of the children depends not upon the question whether their mother, had she been living, could have waived the settlement, but whether the father was bound by it, at the time of the death of his wife. If the husband is bound, as he would be in the supposed case, the children are certainly entitled.[3] In the case just cited, a married woman entitled to a legacy appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitor for the purchaser and for the wife agreed to refer the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of the moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children; it was held by Sir James Wigram, V. Ch., that the husband and those claiming under him were, by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled.

With regard to the amount of the wife's property to be settled, the general rule is, that one half shall be so settled; but this is a matter which

[1] Hodgens v. Hodgens, 11 Bligh, N. S. 104, per Lord Cottenham. And see Lloyd v. Williams, 1 Mad. Ch. R. 467.

[2] De la Garde v. Lempriere, 6 Beavan, 344.

[3] Lloyd v. Mason, 5 Hare, 139.

rests much in the discretion of the court, which will take into consideration the amount of the wife's fortune, already received by the husband, or any previous settlement which may have been made.[1]

This equity of the wife, it has already been shown, may be waived by her. It may also be barred by an adequate settlement having been made upon her, but not by an inadequate one, unless it be by an express stipulation before marriage. It will constitute a valuable consideration for a post-nuptial settlement by the husband upon the wife, which will be supported in equity as against creditors.[2] Where the husband voluntarily settles upon his wife personal estate, which came to her by descent from her relatives, to no greater extent than the court of chancery would have directed him to do upon a bill filed against him by the wife, to protect her equitable claim to a support for herself and her children out of the same, such voluntary settlement will be sustained as against the creditors of the husband; although it is void as to other property contained in the same conveyance to the trustee.[3]

The wife's equity extends to a debt due to her before marriage, and which the husband has not reduced to possession; and an execution creditor, coming into a court of equity to reach it, must take it subject to the wife's equity.[4] Where the husband has violated the marriage contract, or has been guilty of an act which entitles the wife to a decree for a divorce, or a separation and for alimony, she is in equity entitled to a restoration of the property which the husband holds by virtue of his marital rights. And a court of equity, upon the bill of the wife, filed for the purpose of obtaining a divorce or separation, will not only protect her right to such property as against the husband himself, but also as against judgment creditors, and others who do not stand in the situation of *bona fide* purchasers without notice of her equitable rights, and of her intention to enforce them by a suit for a divorce or separation.[5]

So where the husband has married a ward in chancery, without the consent of the court or of her legal guardian, the court, upon the ground of the husband's contempt, has jurisdiction to interfere, upon the application of the friends of the infant wife, even without her consent, to restrain the husband and his creditors from intermeddling with her estate, until a proper settlement is made for the support of the wife and the issue of the marriage.[6]

[1] Jewson v. Moulson, 2 Atk. 423. Brown v. Clark, 3 Ves. 166.

[2] Salway v. Salway, Ambler, 692. Wickes v. Clarke, 8 Paige, 161, 166. Partridge v. Stevens, 10 Paige, 618, 624.

[3] Wickes v. Clarke, 8 Paige, 161.

[4] Smith v. Kane. 2 id. 303.

[5] Van Duzer v. Van Duzer, 6 id. 366.

[6] Id.

But if the husband has been guilty of no contempt in acquiring the legal title to his wife's property, nor of such misconduct as to entitle her to a divorce or a decree, or a decree for a separation from bed and board, equity cannot, upon the application of the wife, interfere with her husband's title as tenant by the curtesy initiate in the wife's property, so as to place it beyond his reach or the reach of his creditors, and secure it for the support of the wife and her children.[1]

Before noticing some other points, growing out of marriage settlements, and the separate ownership of property secured thereby to the wife, it may be expedient in this place to advert to some recent legislation in this state, which has an important bearing on the subject which we have been discussing.

The act for the more effectual protection of the property of married women, passed April, 1848, (L. of 1848, p. 307,) enacts, that the real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female. The second section enacts, that the real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of the husband; but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband, theretofore contracted. And the third section as amended in 1849 (L. of 1849, p. 528) enacts, that any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts. This statute has been held to be prospective, and, so far as it may be supposed to affect rights already vested in the husband by the marriage, to be unconstitutional and void.[2] Though it has been spoken of in some of the cases[3] as an unwise innovation, it is believed that its wisdom and policy will be vindicated by subsequent events, if it be properly administered.

[1] Van Duzer v. Van Duzer, 6 Paige, 366.

[2] Holmes v. Holmes, 4 Barb. 295. White v. White, 5 id. 474. Snyder v. Snyder, 3 id. 621. Perkins v. Cottrel, 15 id. 446.

[3] Holmes v. Holmes, 4 Barb. 299, per Barculo, J. American Home Missionary Society v. Wadham, 10 id. 606, per Taylor, J.

One effect of the act is to take from the husband the means of paying the debts contracted by the wife before marriage. At common law the obligation to discharge the legal liabilities of the wife, before marriage, was compensated by the provision which vested the personal property and choses in action of the wife, in the husband, by virtue of the marriage. The apparent injustice of leaving the husband liable for his wife's debts, while the means of payment which the common law afforded was withheld, has been removed by the act of 1853,[1] which permits actions to be maintained against the husband and wife jointly, for any debt of the wife contracted before marriage, but directs that the execution on any judgment in such action shall issue against, and such judgment shall bind, the separate estate and property of the wife only, and not that of the husband. The statute further provides, that any husband who may thereafter acquire the separate estate and property of his wife, or any portion thereof, by any ante-nuptial contract, or otherwise, shall be liable for the debts of his wife contracted before marriage, to the extent only of the property so acquired, as if the act had not passed.

These several statutes have thus altered the common law, with respect to the rights and liabilities of the husband, growing out of the marriage relation. The husband can no longer lay hold of the wife's property, which comes to her in the way mentioned in the statute of 1849. And if he and his wife are compelled to resort to a court of equity to obtain it, there would seem to be no necessity for the court to require a settlement to be made, in favor of the wife, since the property all belongs to her, without any deduction for the benefit of the husband. The wife's equity is thus converted into a legal right; and the reason why any portion of it should be for the husband's benefit—that is, for the payment of her debts—is removed by the act of 1853, which discharges him from that liability, except to the extent of the property received by him, under an ante-nuptial settlement.

The statutes in question do not affect the title of the husband to the wife's services, nor to her earnings in her business or occupation, if she carries on an occupation with his consent. These belong to the husband, and are liable for his debts, as before the statutes.[2]

The increase of property owned by the wife before marriage, belongs to her, and not to her husband. When she retains the possession or the right of possession of it, the fact that she allows her husband to have the

[1] Laws of 1853, p. 1057.

[2] Lovett v. Robinson, 7 How. Pr. R. 105.

charge and management of it, and to fatten her swine, for example, will not entitle him to the increase of her animals, or the pork made from the swine, but they will belong to her.[1]

If chattels be purchased by the husband, the title vests in him and not in her, though part of the consideration be paid by her.[2]

And where the husband was permitted by his wife to occupy her land, and receive and dispose of the products, the law will not, in the absence of proof of an express agreement that she should share in the products, or that he should account to her, imply such a contract, but will rather regard her as having made a gift of the use of the land to the husband while such occupation continued.[3]

The case last cited admits, by implication, that the wife may convey a title to her husband, by a gift *inter vivos*, of her personal property, without the agency or intervention of a court of equity. The court surely would not presume such gift, unless such gift could be in fact made by the wife to her husband, notwithstanding the coverture. The language of the third section of the act of 1849 is broad enough to admit of that construction. But a different rule has been adopted by another court with respect to the wife's real estate, or rather with respect to her contingent right of dower, and it has been held that a married woman cannot during coverture convey to her husband, by deed, her dower right in his real estate, under the said act; and the construction was adopted, that she might convey to persons other than her husband, but not to him This construction leaves in force the common law rule, that husband and wife cannot at law convey to each other.[4] Both the cases last mentioned were cases in a court of law, and decided upon common law principles.

Whether under the law of 1848, as amended in 1849, a married woman, being clothed with the right of property, either by ownership antecedent to the marriage, or acquired subsequently by inheritance, or by gift, grant, devise or bequest from any person other than her husband, may dispose of the same as a *feme sole*, without the intervention of a court of equity, has not yet been authoritatively decided by the highest court of the state; and the opinions of the profession on the subject are conflicting The rule of the common law, is that the power of alienation is an inseparable incident of the right of property,[5] and the language of the statute

[1] Van Sickle v. Van Sickle, 8 How. Pr. R. 265.

[2] Id.

[3] Id.

[4] Graham v. Wyck, 14 Barb. 531.

[5] American Home Missionary Society v. Wadham, 10 id. 601. Bell's Law of Property, 503.

is, without limitation, that a married woman, holding property to her sole and separate use, may convey and devise the same, whether it be real or personal, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect, as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts. The statute so far breaks in upon the common law rule, as to prevent the property of the wife from becoming vested in the husband, or made subject to his control during the coverture, and leaves it subject to her disposition. There was also another rule of the common law, that a married woman could not, during the coverture, dispose of her property so as to defeat the marital rights of her husband, without his assent. Courts of equity, at an early day, encroached upon both these principles of the common law. In establishing the doctrine of a separate estate in the wife, notwithstanding the coverture, they infringed upon the strict rights of the husband, as they were expounded by the common law courts. Having thus established the doctrine that the wife might enjoy a separate estate during the coverture, as a *feme sole*, the laws of property attached to this new estate, and the power of alienation was annexed to it as an inseparable incident. But equity again interposed, and by another violation of the law of property, supported the validity of the prohibition against alienation, contained in the deed or will under which she derived her title, when it was clearly expressed.[1] Hence it follows, that, in relation to a separate estate, held by a *feme covert*, without the prohibition of anticipation, she was to all intents and purposes a *feme sole;* equity treating property given to her, for her separate use, without restraint of alienation, as the property of a *feme sole*.[2]

We must doubtless speak with caution on questions growing out of the laws of 1848 and 1849, which have not already been discussed in, and decided by, the courts. If we are at liberty, in the absence of adjudged cases, to conjecture the object of the legislature in enacting those laws, we should incline to the opinion, that it was to abrogate the common law rule with respect to the rights acquired by the husband through his marriage, to the property of his wife; to prevent him from laying his hands on it, if he could find it, and treat it as his own, as was formerly in his power; and to extend to her property, and her control over it, the same principles which courts of equity had previously adopted with respect to

[1] Brandon v. Robinson, 18 Ves. 434. v. Wadham, 10 Barb. 602. Strong v.
[2] American Home Missionary Society Skinner, 4 id. 546.

such property as could only be reached by its aid; or to such as was secured to her by marriage settlement; or to such as belonged to her while she was a ward of the court, and married with its permission. In those cases, indeed, whether the property of the female was large or small, the whole was not settled to the use of the wife and her children, but a portion of it was left to the husband.[1] Under the statute, however, the whole is still the property of the wife, notwithstanding the marriage. Her rights, under the statutes, therefore, are more ample than those preserved to her by courts of equity, in cases where it was administered under its rules.

In a recent case it has been held that a married woman, since the acts in question, who acquires real property in the mode therein provided, may convey the same in all respects as a feme sole. Her husband need not be a party to the deed; and her acknowledgment before the proper officer is sufficient, without a private examination of the wife, separate and apart from her husband, required in other cases.[2]

But the statutes in question have not relieved the wife, during coverture, from her disability, at common law, to make contracts, except as to such contracts as *convey* or devise the property. She is not, by the statute, empowered to make any warranty, or to enforce, in her own name, an executory contract against others. She cannot, at law, make herself liable to be sued for breach of her executory agreements, with respect to her estate. The statute has, indeed, prevented a contract, made before marriage with her intended husband, from being discharged by the marriage, and enacts that it shall be still in force, after such marriage, but has provided no way to enforce it, or to give damages in case of its violation on the part of the husband.[3] At common law, if either was indebted to the other before marriage, their subsequent intermarriage worked a release of it, on the principle, that husband and wife are but one person; as if the feme obligee take the obligor to husband, it was a release in law of the bond.[4] This latter rule has doubtless been abrogated by the statute.

Although the question has not yet been settled by the courts, it is believed that the benign principles of equity will afford, not only to the wife, but to others dealing with her, with respect to her property, adequate relief, for any violation by either party of any of the provisions of the contract. Full effect cannot be given to the statute, unless courts of equity apply the rules which prevailed in those courts, with respect to

[1] Howard v. Moffat, 2 J. Ch. R. 206. Glen v. Fisher, 6 id. 33, 36.

[2] Blood v. Humphrey, 17 Barb. 660.

[3] Laws of 1849, p. 529, § 3.

[4] Clancy's Rights of Women, 155, 156. Coke Litt. 264, b. Strong v. Skinner, 4 Barb. 552.

the separate property of the wife, before the act of 1848, to property acquired by the wife in the manner specified in the statutes of 1848 and 1849.

It may, therefore, be expedient to take a brief survey of the doctrine of the courts of equity, with respect to the separate property of married women, before the passage of the statutes in question. This is the more important, as doubtless many cases will arise, which must be decided by the former law. The learned reader will bear in mind also, that with respect to recent cases, the statutes will, to a slight extent, modify the ancient rules; and this will be sufficiently understood without repeating the caution.

It is a general principle, firmly established in the equity jurisprudence of this state, that a feme covert, with respect to her separate property, is in equity considered as a feme sole. Chancellor Kent inclined to the opinion that she was to be so considered only to the extent of the power clearly given to her by the marriage settlement. But on the review of the same case in the court of errors,[1] it was in substance declared, that a feme covert was absolutely a feme sole in respect of her separate property, when she was not specially restrained, by the instrument under which she acted, to some particular mode of disposition; and it was held, that although a particular mode of disposition was specifically pointed out, it would not preclude her from adopting any other mode of disposition, unless there were negative words restraining her power of disposition to the very mode so pointed out. The learned judge who delivered the opinion of the court of errors, said that the ante-nuptial agreement qualifies the marriage contract, so that the wife retains all the rights which she should have exercised over the property as a feme sole; except so far as she has in express terms incapacitated herself by that instrument.

As a necessary consequence, it was also said by the learned judge, that if a married woman be permitted under a settlement to act as a *feme sole*, in regard to her property, it is perfectly reasonable that her acts, declarations and confessions freely made should be allowed to have the same effect in regard to the rights and interests of others, as if she were in reality a *feme sole*.[2]

At law the wife cannot contract a liability to her husband, or any body else, for borrowed money. The rule at law is universal and it is followed

[1] The Methodist Episcopal Church v. Jaques, 3 J. Ch. R. 77. S. C. on appeal, 17 J. R. 548. Udall v. Kenney, 3 Cowen, 590. 5 J. Ch. R. 464. Vanderheyden v. Mallory, 1 Comst. 462. Gardner v Gardner, 22 Wend. 526. Strong v. Skinner, 4 Barb. 546.

[2] Id. 592. Strong v. Skinner, 4 Barb 555.

also in equity, except in cases where the court treats the wife, with respect to her separate property, as a *feme sole*.[1] In that class of cases it is a legitimate deduction from the well established principles of the court, that separate debts contracted by the wife, expressly on her own account, shall, in all cases, be considered an appointment or appropriation for the benefit of the creditor, as to so much of her separate estate as is sufficient to pay the debt, if she be not disabled to charge it, by the terms of the deed of settlement.[2] In Gardner v. Gardner, already cited, the wife contracted a debt with her husband for borrowed money, to improve her separate estate; and it was held that payment of such a debt would be enforced in equity as a lien upon the estate, unless, by the terms of the title under which she held it, she was prohibited from charging the estate.[3]

The same doctrine was held by Chancellor Walworth.[4] A *feme covert*, it was said, is as to her separate estate considered as a *feme sole*, and she may, either in person or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of the estate, or contracted for her own benefit upon the credit of the separate estate. And the assent and concurrence of her trustee is not necessary for that purpose, when no restriction upon her power over the trust fund is contained in the deed, or instrument, under which such separate estate is held. As a deduction from these principles, it was held that the separate estate of a *feme covert* is in equity chargeable with her debts, contracted upon the credit of that estate, to the same extent that the estate of a *feme sole* is chargeable with the debts of such *feme sole* by the common law.

In Gardner v. Gardner, (supra,) the debt was contracted by the *feme covert* to *improve her estate*. But that is not a controlling circumstance with respect to the validity of the debt. A *feme covert* may render her separate estate liable for debts contracted by her on the credit of such estate, *but which were not for the benefit thereof*. There is some conflict in the English decisions on this subject, arising, it is said, from confounding the rights and privileges of the wife, at common law, with her equitable rights and liabilities, in regard to her separate estate, secured to her by a court of equity, upon principles derived from the civil law. But the spirit of the earliest as well as of one of the more recent decisions in England on this subject, and of the court of errors and supreme court

[1] Gardner v. Gardner, 22 Wend. 528.
[2] Id. Strong v. Skinner, 4 Barb. 554.
[3] Heatly v. Thomas, 15 Ves. 596.
[4] The North American Coal Co. v Dyett, 7 Paige, 9.

of this state, is, that the equitable estate of a *feme covert* is liable for the payment of all her equitable debts, to the same extent as though such debts were contracted by a *feme sole*.[1]

The doctrine we are considering is firmly established, and has been illustrated by numerous well considered decisions. A brief reference to some of these cases will show the nature and extent of the power of the wife over her separate estate, and the manner in which courts of equity uphold contracts and agreements made by her, which would not be enforced by the ordinary rules of the common law.

Thus, it has been held that husband and wife may contract, for a *bona fide* and valuable consideration, for a transfer of property from him to her, and the agreement on her part may be enforced in equity. As where husband and wife agreed by *parol* that he should purchase a lot in her name, and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seised, which should be sold for that purpose; and the husband having executed the agreement on his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; the agreement was decreed to be carried into effect, and the lot was ordered to be sold, and a conveyance executed by the infant trustees by their guardian *ad litem*, and their father and the master were directed to join in the conveyance; and the plaintiff to be reimbursed his advances, out of the moneys arising from the sale.[2]

Though such conveyance by the husband to the wife is presumed, in the first instance, to be intended as an advancement and provision for her, yet that presumption may be rebutted by parol proof.[3]

While a deed from a husband directly to his wife is void in law, yet where the conveyance of the husband is for the purpose of making a suitable provision for the wife, as giving her a deed of certain lands, parcel of his estate, during her widowhood, equity will lend its aid to enforce the provision; especially where the rights of creditors do not interfere, and where the wife had, by an ante-nuptial contract, released all right of dower to arise under the marriage, on the express engagement of the

[1] North American Coal Co. v. Dyett, 7 Paige, 15. Jaques v. The Meth. Ep. Ch. 17 J. R. 548. Hulme v. Tenant, 1 Bro. C. C. 19. Pybers v. Smith, 3 id. 340. Murray v. Barlee, 4 Sim. Rep. 82. Strong v. Skinner, 4 Bart 546.

[2] Livingston v. Livingston, 2 J. Ch. R. 537. Lady Arundell v. Phipps, 10 Ves. 146–149.

[3] Livingston v. Livingston, supra. Finch v. Finch, 15 Ves. 43. Kingdome v. Bridges, 2 Vern. 67.

husband, that she should be endowed of all lands acquired by them during their cohabitation.[1]

So where a husband conveys land to his son, for a nominal sum, on his covenanting to pay an annuity to his mother, during her widowhood, the wife is entitled to her action on the covenant made by her son to her husband for her benefit; and a release of the covenant to the son by the husband, in his lifetime, is fraudulent and void as against the wife; as the sole beneficial interest in the covenant is in her, and she alone is *in equity* entitled to release it.[2]

A court of law would uphold an action in favor of a trustee of the wife against the executors of the husband, to enforce an agreement made by the husband, in his lifetime, for a valuable consideration, in favor of his wife. Thus, where the husband executed a bond to a third person, to secure the amount of a legacy left to the obligor's wife by her father, and received by the obligor after marriage, it has been held that such bond is valid, and will be enforced, even at law, by the trustee against the personal representatives of the obligor.[3] Had this bond been given directly to the wife by the husband, it would have been void at law, though good in equity.

A married woman may mortgage her separate property for her husband's debts, by uniting with him in the mortgage, and she may also execute a valid power to sell the property in case of default of payment; and the wife may in such a case, if she chooses, reserve the equity of redemption to the husband alone, who may sell and dispose of it.[4]

So a *feme covert* may make a valid indorsement of a note given to her before marriage, by a name different from her husband, if the circumstances of the case be such as to warrant the presumption that the indorsement was made with the assent of the husband.[5] In this case the note was the separate property of the wife before marriage, subject to her exclusive control by virtue of an ante-nuptial contract, in which the husband had expressly renounced all interest in, and authority over, the property of his wife, and had united in an instrument which transferred it all to a trustee for her exclusive benefit. He thus had no beneficial interest in it, and no right in any manner to interfere with it. And he never could become responsible in consequence of the indorsement.

The principle already stated, that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, is

[1] Shepard v. Shepard, 7 J. Ch. R. 57.
[2] Id.
[3] Northup v. Barnum's Executors, 15 Wend. 167.
[4] Demarest v. Wynkoop, 3 J. Ch. R. 129.
[5] Miller v. Delamater, 12 Wend. 433.

well settled; and she may, unless restrained by the instrument under which she acquires it, dispose of her property, without the consent or concurrence of her trustee. If she enter into an agreement clearly indicating her intention to affect by it her separate property, and there be no fraud or unfair advantage taken of her, a court of equity will apply her estate in satisfaction of the agreement. And she may give her property to her husband, as well as to any other person, if her gift be free, and not the result of flattery or force, or improper treatment.[1]

Where a legacy due to a *feme covert*, as her separate estate, is paid over to her by the executor, under a decree of the surrogate, obtained upon the application of her husband, and is accepted by her, such payment will protect the executor, not only as to the payment, but as to future accounting. With respect to such legacy she is treated as a *feme sole*, and her receipt is a good discharge.[2]

A wife may, as respects her estate, become surety for her husband, and in such case as against him and his creditors she is entitled to all the rights of a surety. If she mortgage her property for her husband's debts, she is entitled in equity to have his interest in the land, as tenant by the curtesy initiate, first sold and applied in its extinguishment.[3]

A wife having separate property may purchase with it, from her husband, or at judicial sales, his property, real or personal, and have it limited to her separate use. She may purchase a judgment against him, sell his real estate under an execution issued thereon, and become the purchaser.[4] Equity will sustain such purchase, and will protect the real estate purchased, from both her husband and his creditors.[5]

Previous to the Revised Statutes a trustee might hold the mere naked legal estate in real property, for a *feme covert*, while the whole equitable interest and estate therein was in her, and subject to her control. In relation to such an estate, therefore, she was considered as a *feme sole*, and could charge her equitable interest in the property with any debt she might think proper to contract on the credit thereof, which is not inconsistent with the trust or with the nature of her interest in the premises; and which was authorized by the instrument or conveyance creating the trust. All such mere formal trusts, even in favor of *femes covert*, are now abolished. And in the few trusts which are authorized by the Revised Statutes, the whole estate, both legal and equitable, is vested in the

[1] Meth. Ep. Ch. v. Jaques, 17 J. R. 548. 3 J. Ch. R. 77. Bradish v. Gibbs, 3 id. 523. Cruger v. Cruger, 5 Barb. 225.

[2] Guild v. Peck, 11 Paige, 475.

[3] Neimcewicz v. Gahn, 3 id. 614. 11 Wend. 312. Hawley v. Bradford, 9 Paige, 200.

[4] Strong v. Skinner, 4 Barb. 546.

[5] Id.

trustee. The statute also declares, in terms, that the person for whose benefit the trust is created, shall have no estate or interest in the land; but may enforce the performance of the trust in equity.[1] A trust to receive the rents and profits of real estate, or the interest or income of the proceeds of such estate, comes within the 63d section of the article of the Revised Statutes relative to uses and trusts. (1 R. S. 730.) And the *cestui que trust* cannot assign, dispose of, or in any manner mortgage or pledge his interest in the trust property, or in the future income thereof; nor can he contract any debt which will create a lien upon such future income, as to authorize a creditor to reach it by any proceeding, either at law or in equity. As a *feme covert* cannot pledge or create a charge upon her interest in such a trust, in anticipation of the income which may thereafter accrue, or become payable to her; and as she cannot contract a personal liability upon which a judgment can be recovered, her interest, even in the surplus income which is not necessary for her support, cannot be reached, except for a debt contracted before marriage.[2]

The foregoing case arose under a trust deed, made under the Revised Statutes, and was governed by the rules which have been elsewhere considered. The property of the wife could not be reached in this case, because the instrument creating the trust, in connection with the Revised Statutes, prevented the wife from anticipating or disposing of her income or estate in the hands of her trustee.

But the question has sometimes arisen before the statutes of 1848 and 1849, where no trust deed or marriage articles had been executed; and attempts have been made to reach the separate property of the wife, in satisfaction of her debts created before marriage, and while her coverture continued. This could not be done. Thus, a *feme sole* having contracted a debt, and owning some shares of bank stock, married. After marriage, the stock, with the consent of the husband, was transferred to a third person, for the purpose of having it transferred back to her for her sole and separate use, which was accordingly done. She also held other shares of bank stock, which had been transferred to her separate use, by the executors of her husband's estate. The creditor sued the husband and wife at law, and being met by a plea of the husband's bankruptcy, discontinued. He then filed a bill in equity for the purpose of reaching the bank stock. No fraud in the transfer to the wife's separate use being alleged, nor any act of the wife after marriage indicating an intention to charge this fund, it was held by the court of

[1] L'Amoureux v. Van Rensselaer, 1 Barb. Ch. R. 37. 1 R. S. 729, § 60.

[2] L'Amoureux v. Van Rensselaer, 1 Barb. Ch. R. 34.

appeals, against the opinion of the chancellor, that the bill could not be sustained.[1]

As the law stood at that time, it cast upon the husband a temporary liability for the debts of the wife contracted before marriage. That liability ceased with the coverture, unless judgment had been recovered against both. If the wife survived her husband and judgment had not been recovered, her liability would have revived.[2]

Where there is no positive expression of an intention to charge the separate estate of the wife, the great difficulty is to ascertain what circumstances shall be deemed sufficient to create *such a charge*, and what sufficient to create only *a general debt*. It is agreed that there must be an *intention* that the debt shall affect her *separate* estate, otherwise it will not do so.[3]

The doctrine of appointment or appropriation, in equity, relates wholly to engagements made or debts contracted by a married woman, *as such*, having a separate estate, and in reference to it.[4] The fact that the debt has been contracted by a woman during coverture, either as a principal or as a surety, for herself or for her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate, without any proof of a positive agreement or intention so to do.[5] This appointment or appropriation is not enforced by an action *at law*, but by a suit *in equity;* it operates not against the *person*, but the *separate* estate of the wife, in the hands of her trustee.[6] Lord Mansfield and his associates, towards the close of his illustrious career, imported the same doctrine into the courts of law, and held that a *feme covert*, living apart from her husband, and having a separate maintenance, might contract and be sued in a court of law as a *feme sole*, and that her second husband was liable for such debt.[7] The same rule was followed in a few subsequent cases, but it never met the acquiescence of Westminster Hall, and was finally directly overruled by the concurrence of all the judges, after solemn argument.[8] The jurisdiction in this class of cases is unquestionably in equity alone; and with us, where law and equity are united in the

[1] Vanderheyden v. Mallory, 1 Comst. 452. Reversing S. C., 3 Barb. Ch. R. 9.

[2] Id.

[3] Vanderheyden v. Mallory, 1 Comst. 462. Fettiplace v. Gorges, 1 Ves. jr. 46. Jaques v. The Meth. Ep. Ch. 17 J. R. 546. Gardner v. Gardner, 22 Wend. 526.

[4] Vanderheyden v. Mallory, 1 Comst. 463.

[5] Id. Murray v. Barlee, 4 Sim. 82: S. C. 3 Myl. & K. 209.

[6] Id.

[7] Corbett v. Poelnitz, 1 D. & E. 4.

[8] Marshall v. Rutton, 8 id. 546; and see remarks of Lord Brougham on these cases in Murray v. Barlee, 3 Myl. & K.

same court, and prosecuted by the same forms, the remedy is in equity, and not by an ordinary common law action.

It remains to consider, in this connection, what is meant by the *separate estate* of the wife, with reference to the doctrine we are considering. The definition, as sanctioned by the court of appeals in one case, was thus expressed by the learned judge who delivered the prevailing opinion: "A *separate estate* in a *feme covert* only exists in such property, whether it be real or personal, as is settled upon her for her separate use, without any control over it on the part of her husband. It is not all the estate, either in lands or chattels belonging to a *feme covert*, nor is it her right of dower in the real estate of her husband. As to that kind of estate, the court of chancery, for certain purposes, considers her as a *feme sole;* and her contracts relative to it, if made in a particular manner, as binding."[1]

Under the act for the more effectual protection of the property of married women, (L. of 1848, p. 307; L. of 1849, p. 528,) both the real and personal property of any female who thereafter marries, and which she should own at the time of her marriage, and the rents, issues and profits thereof, are not subject to the disposal of her husband, nor liable for his debts, and continue her sole and separate property, as if she were a single woman. And by the third section, as amended in 1849, a married female is empowered to take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal estate, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect, as if she were unmarried; and the same are not subject to the disposal of her husband nor liable for his debts. Her property thus continues her separate estate, by force of the statute, notwithstanding the coverture, and without the intervention of marriage articles or trustees. It would seem that it can be liable to her contracts and charges, during the coverture, in the same way only that before the statutes in question her separate estate was affected by her engagements through the medium of a court of equity, and not by an action at law.

[1] Albany Fire Ins. Co. v. Bay, 4 Comst. 11; S. C. 4 Barb. 407. Meth. Ep. Ch. v. Jaques, 3 J. Ch. R. 77; S. C. in error, 17 J. R. 548. Martin v. Dwelly 6 Wend. 13. Murray v. Barlee, 4 Sim. 82; S. C. on appeal, 3 Myl. & K. 209. Clancy on Rights of Women, 251.

In concluding this branch of the subject, it remains that something should be said with respect to the jurisdiction of courts of equity in decreeing *maintenance* of the wife.

By the rules of the common law the husband is bound to maintain his wife, and may be compelled to find her necessaries, as meat, drink, clothes, physic, &c. suitable to the husband's degree, estate or circumstances. If he turns her away, he gives her a credit wherever she goes, and must pay for necessaries furnished her.[1] If she elope from her husband, though not in an adulterous manner, the husband is not liable for any of her contracts, though the person who gives credit to her for necessaries had no notice of the elopement. But if she offers to return, and her husband refuses to receive her, his liability upon her contracts for necessaries is revived from that time, notwithstanding a general notice not to trust her.[2] If she elopes with an adulterer, and offers to return, he is not bound to receive her, and is not liable for necessaries furnished to her, but if he voluntarily pardon her and take her back, he becomes again liable.[3] And if the husband commits adultery, it justifies the wife in leaving him; and if she does leave his house, he is liable for necessaries, though he forbids all persons from trusting her; nor can he shield himself by offering to provide for her in a separate apartment of his residence.[4]

But this common law liability of the husband cannot be directly enforced in equity; and the remedy is usually obtained by an action at law against the husband, at the suit of the person who has furnished the discarded wife with necessaries suitable to the rank and condition of the husband. In one case the chancellor intimated, that though the husband be a gambler, and there be every probability that he will sacrifice his estate as tenant by the curtesy initiate, and reduce his family to poverty, a court of equity cannot divest him of the estate or control him in the exercise of it, unless indeed there be a suit pending with reference to their separation.[5]

The maintenance which courts of equity enable the wife to obtain, is such as depends on the agreement of the husband for a separate maintenance, or as is secured by marriage articles, or can be obtained from her separate property, or other property of the wife not reduced to possession by the husband, and forfeited by him by his misconduct; or it is such as the court is authorized by statute to decree in the shape of ali-

[1] Per Platt, J. in McGahay v. Williams, 12 J. R. 293. Lockwood v. Thomas, 12 id. 248.

[2] Id.

[3] Bac. Abr. Baron and Feme (H.)

[4] Sykes v. Halstead, 1 Sand. S. C. R. 483.

[5] Van Duzer v. Van Duzer, 6 Paige, 366. Ball v. Montgomery, 2 Ves. jr. 195.

mony to the wife, on pronouncing a divorce, or separation from bed and board. In the first case, it is raised out of the wife's property, and in the second, out of the property of the husband.

Where, by the marriage settlement, the whole real and personal estate of the wife is secured to her separate use, the husband is, notwithstanding, bound to maintain his wife and family during the coverture, and cannot make the expense a charge on her separate estate; and the consent or agreement of the wife, during coverture, that the expenses should be borne by her separate estate, is null and void.[1] Where the wife is abandoned by her husband, or prevented from cohabiting with him by his ill treatment, a court of equity will lay hold of the property or money of the wife, which may be within its power, for the purpose of providing a maintenance for her.[2]

The cases which have already been considered with respect to the wife's equity to a provision out of her own estate, whether they rest upon that doctrine alone, or upon the contract between the husband and wife, afford sufficient illustrations on this subject, without their being again repeated. Equity does not in general ever decree maintenance to the wife out of the husband's estate, except as incident to some other relief, or the court is expressly authorized by statute to grant it.

In this state the jurisdiction over divorces was formerly entertained by the legislature, on special application of the party aggrieved, and by a special act of legislation. This practice was superseded in 1787, by the act of that year, directing a mode of trial and allowing of divorces in cases of adultery.[3] Since then the legislature has not, but in a single instance, granted a divorce, and that was in favor of the wife, in consequence of her husband having abandoned her and joined the society of Shakers.[4] The act of 1787 gave the jurisdiction to the court of chancery over divorces for adultery; and, as incidental to that relief, conferred upon the court, jurisdiction over the subject of maintenance for the wife and children of the marriage. This jurisdiction was enlarged in 1813, and authorized the court, on the application of the wife, to grant limited divorces to her for the cruel and inhuman treatment of the husband, and the like jurisdiction was, in 1824, given to the court on the application of the husband.[5] The whole underwent a revision in 1830;[6] and by the

[1] Meth. Ep. Ch. v. Jaques, 1 J. Ch. R. 450.

[2] Drummond v. Magee, 4 id. 318. Fry v. Fry, 7 Paige, 461. Martin v. Martin, 1 Comst. 473.

[3] 1 Greenl. 428, ch. 69.

[4] Laws of 1818, p. 38, ch. 47.

[5] 2 R. L. of 1813, pp. 197–200. Laws 1824, p. 249, § 12.

[6] 2 R. S. 142 et seq.

constitution of 1846 the jurisdiction, formerly vested in the court of chancery, became vested in the supreme court, created by that instrument.

At common law the court of chancery had no jurisdiction in matters of divorce. That jurisdiction belonged to the ecclesiastical courts, and to parliament.

In this state the supreme court has jurisdiction,[1] to declare the marriage contract void by a sentence of nullity, for either of the following causes: 1. That the parties, or one of them, had not attained the age of legal consent, which is fourteen years in males, and twelve in females.[2] 2. That the former husband or wife of one of the parties was living; and that the marriage with the former husband or wife was then in force. 3. That one of the parties was an idiot or lunatic. 4. That the consent of one of the parties was obtained by force or fraud. 5. That one of the parties was physically incapable of entering into the marriage state. Suits to annul a marriage are conducted in the same manner as other suits prosecuted in courts of equity, and the court has the same power to award issues, to decree costs, and to enforce its decrees, as in other cases.[3] The mode of proceding in these respects belongs to treatises on the practice of the court, rather than to the subject we are considering.

Before the Revised Statutes, it was decided by the chancellor, that the court of chancery had not jurisdiction to dissolve the marriage, or decree a divorce for corporeal impotence.[4] This decision called the attention of the legislature to the subject and led to the existing law. But the court cannot now declare a marriage null for the physical impotence of the defendant, solely upon the confession or declarations of the parties.[5] And, to authorize such sentence, the incapacity must have existed at the time of the marriage, and be incurable.[6]

Mere sterility of the wife can in no case be ground for such sentence of nullity.[7]

Where there is reason to believe that the incapacity can be removed by a slight surgical operation, there is a probability of capacity, and the court cannot annul the marriage. And the fact that the defendant is unwilling to cohabit with the complainant, and therefore declines to submit

[1] 2 R. S. 142.

[2] Laws of 1830, p. 301, § 24, repealing 2 R. S. 138, § 2, and restoring the common law. 1 Bl. Com. 490.

[3] 2 R. S. 144, § 35.

[4] Burtis v. Burtis, Hopk. 557.

[5] 2 R. S. 144, § 36.

[6] Devanbagh v. Devanbagh, 5 Paige, 554; S. C. 6 id. 175.

[7] Id.

to the operation, is no ground for a sentence of divorce; as the court has no power to compel the performance of the marriage vows.[1]

But the court has power to compel the party to submit to a surgical operation, when necessary to ascertain the facts; but in a suit against a female, the court will be content with the testimony of competent surgeons, as to a former examination by them, and that the incapacity is incurable.[2]

In one case, where the wife in her answer admitted present incapacity, but attributed it to disease, subsequent to the marriage, the court ordered her to submit to an examination by physicians to be named by the husband and sanctioned by the court, and also to answer upon oath interrogatories as to the commencement and progress of the disease.[3]

Prior to the Revised Statutes, the court of chancery entertained jurisdiction to declare the nullity of a marriage where one of the parties was a lunatic.[4] The chancellor said it was too plain a proposition to be questioned, that idiots and lunatics are incapable of entering into the matrimonial contract. Such marriage is absolutely void. And as the court of chancery had jurisdiction in matrimonial causes, it was the proper tribunal to pronounce by its decree that the marriage was void *ab initio*. Some of the suggestions of the chancellor had their influence in framing the existing statute.

The court has also jurisdiction to grant divorces dissolving the marriage, whenever adultery has been committed by any husband or wife, in either of the following cases: 1. Where both husband and wife were inhabitants of this state, at the time of the commission of the offense. 2. Where the marriage has been solemnized or has taken place within this state, and the injured party, at the time of the commission of the offense, and at the time of exhibiting the bill of complaint, is an actual inhabitant of this state. 3. Where the offense has been committed in this state, and the injured party, at the time of exhibiting the bill of complaint, is an actual inhabitant of this state.[5] The action for a divorce, when brought by the wife, is brought in her own name, and the answer of the opposite party is put in without oath or affirmation. If the adultery be denied, the court may direct the issue to be tried by a jury. If the adultery be admitted by the defendant, the court refers the cause to a referee with directions to take proof of the facts charged, and to report the same

[1] Devanbagh v. Devanbagh, 5 Paige, 554; S. C. 6 id. 175.

[2] Id.

[3] Newell v. Newell, 9 Paige, 25.

[4] Wightman v. Wightman, 4 J. Ch. R. 343, where the whole subject is fully discussed.

[5] 2 R. S. 144.

to the court with his opinion thereon.[1] The court has no power, even with the consent of the parties, to decree an absolute or a partial divorce, except in the special cases provided for by statute.[2]

Though the fact of adultery be established, the court may deny a divorce in the following cases: 1. Where the offense shall appear to have been committed by the procurement, or with the connivance of the complainant. 2. Where the offenses charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof, or by the voluntary cohabitation of the parties, with the knowledge of the fact. 3. Where there shall have been no express forgiveness, and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offense charged. 4. Where it shall be proved that the complainant has also been guilty of adultery, under such circumstances as would have entitled the defendant, if innocent, to a divorce.[3]

The doctrine with respect to *recrimination* and condonation was borrowed from the English ecclesiastical law, and by them from the civil law. The first is founded on the principle that a party cannot be permitted to complain of the breach of a contract which he has first violated,[4] and the second, on the ground that he shall not insist on the violation of a contract which he has himself waived, or call for punishment of an act which he has himself forgiven

The recriminatory charge of adultery must be set up in the same manner as in a bill, and with the same allegations, that it was committed without the defendant's procurement, connivance, privity or consent, and these allegations are issuable.[5]

Condonation is a conditional forgiveness; and a repetition of the injury revives a condoned adultery.[6] It must be insisted on in the answer, or urged by way of special plea.

Voluntary cohabitation of a wife with her husband, with full knowledge of an act of adultery committed by him, or *vice versa*, is legal evidence of a condonation of the offense, so as to bar a suit for a divorce.[7] Condonation may be inferred from cohabitation, but the inference may be re-

[1] 2 R. S. 145. Code, § 72.

[2] Palmer v. Palmer, 1 Paige, 276. Perry v. Perry, 2 id. 501.

[3] 2 R. S. 145, § 42.

[4] Beebe v. Beebe, 1 Hagg. 789.

[5] Morrell v. Morrell, 3 Barb. S. C. R. 236. Beebe v. Beebe, 1 Hagg. 789. Foster v. Foster, 1 Hagg. Const. Rep. 144. Astley v. Astley, 1 Hagg. Ecc. R. 714. Wood v. Wood, 2 Paige, 108.

[6] Smith v. Smith, 4 Paige, 432. Burr v. Burr, 10 id. 24, 34.

[7] Williamson v. Williamson, 1 J. Ch. R. 488. Johnson v. Johnson, 4 Paige, 460. 14 Wend. 637. Wood v. Wood, 2 Paige, 108.

pelled by accompanying circumstances.[1] And it ought not to be held in all cases a strict bar against the wife, as she is, to a certain extent, under the control of her husband.[2]

Whether condoned adultery will be revived by subsequent cruel treatment of the wife by the husband, or whether it can be revived only by an act of the same kind, is left in doubt by the New-York cases. The chancellor held to the latter, and the judges of the supreme court the former opinion, and their opinion seems to be in conformity to the course of the English decisions.[3]

If the wife be the complainant, and a decree dissolving the marriage be pronounced, the court is authorized to make a further decree or order against the defendant, compelling him to provide for the maintenance of the children of the marriage, and to provide such suitable allowance to the complainant, for her support, as to the court shall seem just, having regard to the circumstances of the parties respectively.[4] In such a case, too, if the wife, at the time of pronouncing such decree, be the owner of any real estate, or have in her possession any goods or things in action, which were left with her by her husband, acquired by her own industry, given to her by devise or otherwise, or to which she may be entitled by the decease of any relative intestate, all such real estate, goods or things in action, the statute declares shall be her sole and absolute property.[5]

Where the husband is complainant, and a decree dissolving the marriage is pronounced, the right of the complainant to any real estate owned by the defendant at the time of pronouncing the decree, in her own right, and to the rents and profits thereof, are not taken away or impaired by such dissolution of the marriage; and the husband is also entitled to such personal estate and things in action, as may belong to the defendant, or be in her possession at the time such decree shall be pronounced, in like manner as though the marriage had continued.[6] And the wife, being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, is not entitled to dower in her husband's real estate, or any part thereof; nor is she entitled to any distributive share in his personal estate.[7]

Although the divorce on the ground of adultery is often spoken of as a divorce *a vinculo matrimonii*, yet it is not so described in the statute,

[1] Whispel v. Whispel, 4 Barb. 217.

[2] Wood v. Wood, supra.

[3] Johnson v. Johnson, 4 Paige, 460. Reversed by court of errors, 14 Wend. 637; and see the English Ecclesiastical cases under preceding note

[4] 2 R. S. 145, § 45.

[5] Id. 146, § 46.

[6] Id. 146.

[7] Id. § 48.

nor does it go to that extent. The complainant, indeed, may marry during the lifetime of the defendant, but the defendant convicted of adultery is not permitted to marry again, until the death of the complainant.[1] And the wife being divorced for the adultery of the husband is, nevertheless, entitled to dower in lands whereof the husband was seised during the coverture, prior to the divorce for adultery committed by him, she being the innocent and he the guilty party.[2]

If the divorce were a technical divorce *a vinculo matrimonii*, it would effectually bastardize the issue of the marriage. But the divorce granted in this case has no such effect. If the wife is the complainant, the legitimacy of the children of the marriage, born or begotten of her before the commencement of the action, is not affected by the decree of dissolution.[3] And where the husband is complainant, the legitimacy of children, born or begotten before the commission of the offense charged, is not affected by the decree; but the legitimacy of other children of the wife, may be determined by the court upon the proofs in the cause. In every such case, the legitimacy of all children, begotten before the commencement of the suit, is presumed until the contrary is shown.[4]

The court is also empowered to grant a *limited divorce*, or a separation from bed and board forever, or for a limited time, on the complaint of a married woman, in the following cases: 1. Between any husband and wife, inhabitants of this state. 2. Where the marriage shall have been solemnized, or shall have taken place, within this state, and the wife shall be an actual resident at the time of exhibiting her complaint. 3. Where the marriage shall have taken place out of this state, and the parties have become and remained inhabitants of this state, at least one year, and the wife shall be an actual resident at the time of exhibiting her complaint.[5] The statute enacts that such separations may be decreed for the following causes: 1. The cruel and inhuman treatment by the husband of his wife. 2. Such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to cohabit with him. 3. The abandonment of the wife by the husband, and his refusal or neglect to provide for her.[6] The Revised Statutes contemplated only

[1] 2 R. S. 146, § 49.

[2] Wait v. Wait, 4 Comst. 95. 4 Barb. 210, dissenting opinion. Burr v. Burr, 10 Paige, 25. Dictum of M'Coun, V. Ch. contra, 2 Edw. Ch. R. 596, and per Hand and Cady, justices, 4 Barb. 198 et seq.

[3] 2 R. S. 145, § 43. Id. § 44. Cross v. Crow, 3 Paige, 139. Van Aernam v. Van Aernam, 1 Barb. Ch. R. 375. Montgomery v. Montgomery, 3 id. 132. Clayton v. Wardell, 5 Barb. 214.

[4] 2 R. S. 146, § 50. Id. § 51.

[5] Perry v. Perry, 2 Paige, 501. Perry v. Perry 2 Barb. Ch. R. 311. 1 id 516

an action by the wife against the husband for his cruelty towards her, as a ground of separation. But it seems the act of 1824, (L. p. 249, § 12,) has been left unrepealed, thus giving to the husband a corresponding right to obtain a decree of separation from his wife, for similar causes. And such separation has, on several occasions, been granted in actions brought by him.[1]

The bill in these cases is required to state particularly the nature and circumstances of the complaint on which the complaining party relies, setting forth times and places with reasonable certainty; and the defendant is permitted to prove, in his justification, the ill conduct of the complainant, and on establishing such defense, to the satisfaction of the court, the bill will be dismissed.[2] The recriminatory matter, to be admissible in evidence, should, it is presumed, be set up in the defendant's answer.[3]

Upon decreeing a separation in any suit, the court may make such further decree as the nature and circumstances of the case may require, and may make such order and decree for the suitable support and maintenance of the wife and her children, or any of them, by the husband, or out of his property, as may appear just and proper. And although a decree for separation from bed and board be not made, the court may make such order or decree for the support und maintenance of the wife and her children, or any of them, by the husband, or out of his property, as the nature of the case renders suitable and proper.[4]

Though a decree for a separation forever, or for a limited time, be pronounced, it may be revoked at any time thereafter, by the same court by which it was pronounced, under such regulations and restrictions as the court may impose upon the joint application of the parties, and upon their producing satisfactory evidence of their reconciliation.[5]

With regard to what shall be deemed *cruelty*, within the meaning of the law, where the application for a divorce is made by the wife, it has been held that the cruelty, which entitles her to a separation, is that kind of conduct which endangers the life or health of the complainant, and renders cohabitation unsafe.[6] The refusal of the husband to let his wife attend a particular church of which she was a member, though unkind

[1] Independently of the statute the husband could not maintain a bill for separation on account of the cruelty of his wife, as the common law was supposed to give him power to protect himself. Van Veghten v. Van Veghten, 4 J. Ch. R. 501.

[2] R. S. 147 §§ 52, 53.

[3] Morrell v. Morrell, 3 Barb. S. C. R. 236. Hopper v. Hopper, 11 Paige, 46 Code, § 149.

[4] 2 R. S. 147.

[5] Id. § 56.

[6] Perry v. Perry, 2 Paige, 501.

and oppressive, was said, in one case, to afford no ground for a separation.[1] On another occasion, words of menace, accompanied by a probability of bodily violence, were held to be sufficient. It was thought that it was enough if they inflict indignity and threaten pain.[2]

The statute on this subject seems to have incorporated the general doctrines of the ecclesiastical law. In one case,[3] the vice chancellor, in discussing the general subject of cruelty, with reference to a separation between the parties, said that in determining what is cruelty, or the *sævitia* of the ecclesiastical law, we must look into the cases decided by the courts having jurisdiction in matrimonial cases. It is difficult, and perhaps hardly safe, to define in terms sufficiently clear and comprehensive, what constitutes cruelty in a legal sense. Lord Stowell has laid down the rule in several cases. In Evans v. Evans, (1 Hagg. Eccl. Rep. 35,) he observes, that the causes must be great and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. What falls short of this is with great caution to be admitted. What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injuries, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. Similar principles were advanced in other cases.[4]

But while the general ground on which the court proceeds is to guard the wife from *actual* violence or danger to her person, there are nevertheless exceptions to this rule. Thus, spitting on the wife has been adjudged a gross act of cruelty, on the ground, it is presumed, of indignity to the person.[5] So also the husband's attempt, when affected with the venereal disease, to force his wife to his bed, is of a mixed nature, partly cruelty

[1] Lawrence v. Lawrence, 3 Paige, 267.
[2] Whispell v. Whispell, 4 Barb. 217.
[3] Barber v. Barber, before V. Ch. 4th Circuit, 1846. Am. Law Journ. for 1849, 193.
[4] Harris v. Harris, 2 Hagg. Eccl. R. 154. 2 Phill. 111. Warring v. Warring, id. 132. Holden v. Holden, 1 Hagg. Eccl. R. 453.
[5] D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. 777. Shelf. M. & D. 430.

and partly evidence of adultery.[1] So also the husband's attempt to debauch his own women-servants, is a strong act of cruelty,[2] perhaps not alone sufficient to authorize a divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house, is brutal conduct, of which the wife has a right to complain. This is the language of Lord Stowell, in Popkin v. Popkin. Also a groundless and malicious charge against the wife's chastity, followed up by turning her out of doors, and not attempted to be pleaded or proved, may be alleged, with other acts of cruelty, as a ground for a separation. And in the principal case of Barber v. Barber, a groundless charge by the husband against the wife of physical incompetency, followed up by legal proceedings to establish its truth, which proved abortive, was, in connection with other facts, adjudged legal cruelty, and a decree of separation was granted.

Such is the rule with respect to the term cruelty. Although primarily it has reference to such conduct in the husband as may endanger the safety or health of the wife, yet it may exist where there is no danger to her person, as in spitting upon her; and also where no personal violence was inflicted upon her, as in attempts on his part to debauch his own servants.[3]

When the suit is brought by the husband for separation, on the ground of the cruelty of the wife, the court will require a strong case to justify its interference. In general, the superior strength of the husband, in connection with his common law rights over his wife, renders the interposition of courts of equity of rare occurrence. On one occasion the chancellor observed, that to sustain a bill of this kind, by the husband against the wife, it is not sufficient to show a single act of violence on her part towards him, or even a series of such acts; so long as there is no reason to suppose that he will not be able to protect himself and his family by a proper exercise of his marital power. It is material, therefore, that he should be permitted to establish such continued course of bad conduct on the part of the wife, towards himself and those who are under his protection and care, as to satisfy the court that it is unsafe for him to cohabit or live with her.[4] This case came before the chancellor on exceptions to the complainant's bill, and the charges in the bill which the chancellor

[1] Durant v. Durant, 1 Hagg. Ecc. R. 733, 767.

[2] Popkin v. Popkin, note to Durant v. Durant, id 767.

[3] Otway v. Otway, 2 Phill. 95.

[4] Perry v. Perry, 1 Barb. Ch. R. 518.

held were pertinent, and which, if proved, would entitle the husband to a decree of separation, on the ground that his life would be in danger should he continue to reside under the same roof, were, in substance, that she drove his sick daughter from her bed and wounded her, and finally by violence forced her to leave his house, and probably shortened her life by breaking in her ribs; that she drove his son from the house when he was wasting away with consumption; that she beat and lacerated her own grown up son in such a manner as to confine him to the house for several days; that her conduct towards another daughter, who was dying with consumption, was such as to render it necessary for the complainant to secure the room of such daughter by locks and bolts, whenever he was from home, to protect her from the violence of the defendant; that the clergyman, who was called to administer the consolations of religion to the dying daughter, was compelled to discontinue his visits in consequence of the defendant's conduct towards him; that she beat her own grown up daughter, pulled a handful of hair from her head, and injured her so severely that she fainted; that at other times she struck the same daughter with violence, threw a cup of tea in her face, struck her on the head with an earthen vessel, threw her upon the floor and jumped on her, &c.; that she beat a child, who was bound to her, so severely, that the child was discharged by the magistrates; that she attacked a workman employed by the complainant, with dangerous weapons, and drove him from the house; that by her violence and misconduct, she disturbed and at last compelled her husband to abandon his accustomed family worship; and that she was in the daily habit of using obscene and blasphemous language in the presence of the family, and at their meals. These facts, said the chancellor, if proved, or if admitted by the answer, will have a very great influence in giving character to the acts of personal violence, which are stated in the bill as having been committed by the defendant upon the complainant. And if they are the proper subjects of proof, they may be stated in the bill.

The defendant, it seems by a subsequent report of the case,[1] suffered the bill to be taken as confessed, and the case came again before the chancellor on the master's report of the evidence, by which it appeared that the facts were proved substantially as alleged. The testimony showed also that the defendant had committed personal violence upon the complainant himself, and frequently wished him dead; so as to render it wholly improbable that he could, by any discreet exercise of his marital power, keep her within such control that his health at least would not be endan-

[1] Perry v. Perry, 2 Barb. Ch. R. 311.

gered, so long as he continued to live with her. It was admitted that the evidence of her violence and brutality towards other members of the family would not, of itself, entitle the complainant to a decree of separation. A decree of separation was granted.

This was doubtless an extreme case. It probably would not require a concurrence of all the acts of violence which were charged in this case, to entitle a husband to a decree of separation from his wife.

An application for a divorce on the ground of adultery, or for a separation from bed and board for cruelty, gives rise to the interference of the court in favor of the wife, to afford her, out of her husband's estate the means of prosecuting or defending the suit; of supporting her during its pendency; of making proper order for the care, custody and education of the children; and on the final success of the wife, of allowing to her suitable alimony out of her husband's estate. The power of the court over this subject is full and ample, and has frequently and beneficently been exerted.[1]

Where a woman files a bill to have a marriage declared null, on the ground of impotence, or the original illegality of the contract, it seems that presumptively she is not entitled to *ad interim* alimony, or an allowance for expenses of the suit; but where the man files such a bill, and the woman denies the illegality of the contract on oath, or the physical incapacity, she is entitled to alimony and an allowance to defend.[2] The allowance in such cases does not depend wholly upon the statute, but upon the practice of the court as it existed before the statute.[3]

The making of an allowance to the wife, to enable her to carry on her suit, or to conduct her defense, whether the bill be for a divorce or for a separation, is discretionary with the court.[4] Where it is probable, however, that the wife may succeed, especially in a suit for a divorce on the ground of adultery of the husband, in which the wife is allowed to prosecute in her own name, and where it appears that she is entirely destitute of the means of carrying on the suit, it is almost a matter of course to require the husband to make her a reasonable allowance, according to his ability, for the necessary expenses of the suit, and to require the husband to furnish her with the necessary clothing and sustenance during the pen-

[1] 2 R. S. 147, 148.

[2] North v. North, 1 Barb. Ch. R. 241. Barber v. Barber, MS. before V. Ch. 4th circuit, 1846.

[3] North v. North, supra. Bird v. Bird, 1 Lee's Eccl. R. by Phill. 209. Portsmouth, Earl of, v. Portsmouth, 3 Add. Eccl. R. 63.

[4] 2 R. S. 148, § 58. Jones v. Jones, 2 Barb. Ch. R. 146.

lency of the suit, if he is able to do so.[1] The same general principles are applicable to suits brought by the wife against the husband, for a separation from bed and board, on the ground of cruel treatment, or of abandonment. But in this class of cases the wife cannot institute a suit against her husband, without the assistance of a responsible person as her next friend, who is to be answerable to the defendant, for the costs of the litigation, if the complainant fails in the suit. And the court, in cases of this nature, will not direct an advance to be made to the wife, or to the next friend, for the purpose of carrying on the suit, or for alimony *pendente lite*, where there is no probability that the complainant will be able to succeed in her suit.[2]

On one occasion,[3] Sir William Scott said, "in suits instituted by the husband or the wife, for I consider that fact to be indifferent, the wife is a privileged suitor, as to costs and alimony; and on the same principle that the whole property is supposed by law to be in the husband. If the wife, therefore, is under the necessity of living apart, it is also necessary that she should be subsisted during the pendency of the suit; and that she should be enabled to procure justice by being provided with the means of defense." And on another occasion,[4] the same learned judge said, that in general the husband is bound to defray the wife's costs; otherwise the wife would be disarmed and denied justice. The husband has by the law of this country all the property; and therefore the wife must have the means of self defence and of subsistence from him; but where she has a separate fortune, the court always considers whether such separate means are sufficient for self defence and self subsistence. These principles have been approved by the chancellor, and form a part of our jurisprudence on this subject. If the court is satisfied the wife has no reasonable ground of complaint, or is altogether in the wrong, it might, in the exercise of a sound discretion, refuse the means to enable her to carry on an unjust litigation at the expense of her husband. But it would be manifestly unjust to condemn the wife unheard, or upon an *ex parte* affidavit of witnesses, when she has had no opportunity to cross-examine them, or to disprove their allegations.[5]

In an application by the wife for an allowance and for the means of

[1] 2 R. S. 148, § 58. Jones v. Jones, 2 Barb. Ch. R. 146.

[2] Id. 147. Wood v. Wood, 2 Paige, 454; S. C. 8 Wend. 377. Code of 1851, § 151.

[3] Wilson v. Wilson, 2 Consist. R. 204.

[4] D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. R. 777.

[5] Wood v. Wood, 2 Paige, 113, 114. Hollerman v. Hollerman, 1 Barb. S. C. R. 64. Bissell v. Bissell, id. 430. Snyder v. Snyder, 3 id. 621. Jones v. Jones, 2 Barb. Ch. R. 146.

making her defense, she must deny in her petition, on oath, the truth of the charges made against her, or show therein some valid defense to the husband's suit.[1] And the court will not, on such a motion, decide as to her guilt, by opposing affidavits, but leave her to be indicted and punished for perjury, if her denial of the charges upon oath be untrue.[2]

The court has always exercised a broad and liberal discretion, as well as an indulgent consideration towards the wife; especially where the husband is of sufficient ability, and has manifested a delay or backwardness in prosecuting his complaint. In one case, where the bill was filed by the husband for a divorce on the charge of adultery, and the charge was denied under oath by the defendant, and an issue was awarded to try the question; and an allowance was made for the expenses of the suit and for *ad interim* alimony; the complainant having neglected to bring on the issue to be tried, the defendant, upon the affidavit of her attending physicians, showing that her health was such that the safety of her life required that she should spend the winter months, either in the West Indies or in the southern states; and upon hearing counsel for the complainant, the vice chancellor ordered a gross sum of $400 to be paid to her immediately, for the expense of her journey and board for four months; and that her former allowance for *ad interim* alimony should in the mean time be suspended. The income of the husband was about $2000 a year. On appeal by the husband to the chancellor, it was contended that the court was not authorized to make an allowance for that purpose, but the order was affirmed by the chancellor.[3]

The alimony allowed to the wife pending the suit is much smaller, in proportion, than that which is assigned her as a permanent provision, after she has obtained a decree for a divorce or a separation.[4] If the bill is improperly filed, or is multifarious, so that a decree cannot be grounded upon it, alimony or an allowance for costs cannot be ordered.[5] But such an allowance has been ordered, pending a demurrer to the wife's bill, and may be granted before answer, when the bill is filed by the wife.[6]

It is perhaps impossible to fix any definite rule for the allowance of *ad interim* alimony. The chancellor said, on one occasion, that the husband who is guilty of adultery voluntarily subjects himself and his property to the jurisdiction of the court, so far as to enable the chancellor to order his property to be applied to the support of his family during the

[1] Osgood v. Osgood, 2 Paige, 621.
[2] Id. 623.
[3] Lynds v. Lynds, 2 Barb. Ch. R. 72.
[4] Lawrence v. Lawrence, 3 Paige, 267. Germond v. Germond, 4 id. 643.
[5] Rose v. Rose, 11 Paige, 166. Wood v. Wood, 2 id. 452. 8 Wend. 377.
[6] Mix v. Mix, 1 J. Ch. R. 108. Denton v. Denton, 1 id. 364.

litigation and afterwards. The court may also compel him to devote a part of his daily earnings to the same object pending the suit.[1] In that case the bill was by the wife for the adultery of the husband, and there were three children of the marriage, the eldest of whom was but six years old, and they remained with the mother and were supported by her. The income of the husband's property, including his personal services as captain of a coasting vessel, was $35 a month, and the court ordered the defendant to pay $25 a month for the support of his wife and children pending the litigation.

If the parties stand upon an equality as to means, both depending upon their peasonal labor for support, and neither party earning more than enough for that purpose, the court has declined to make an order, which would only result in the imprisonment of one party without benefit to the other.[2] And so if the wife has sufficient property of her own to defray the expenses of the litigation, and support herself during its pendency, there is no occasion, nor is it usual, to order the husband to advance any more until her own means are exhausted.[3]

With respect to the custody of the children of the marriage, pending the suit, the court will not, in general, make an *ex parte* order, but will require notice to be given, unless it be a case of urgent necessity.[4] An injunction may be granted to prevent the children from being removed out of the state until the court can be applied to, to dispose of the question as to their temporary custody.[5]

Where the parties cohabit together during the suit, the court will not give to either the exclusive charge of the children.[6]

In one case,[7] Chancellor Kent, pending a bill by the wife for a divorce, on the ground of the cruelty of the husband, and under the peculiar circumstances of the case, ordered that the wife should have the exclusive custody, care and direction of the children, and that the husband should not be permitted to visit them, except under the direction of a master in chancery. In that case, the husband was shown to be intemperate, violent in his temper, and accustomed to treat both his wife and children with cruelty; and he had no property of his own, and the wife was entitled to a large estate.

After the rights of the parties have become fixed by the decree, there is, of course, no longer any dispute as to which is the guilty party. The

[1] Kirby v. Kirby, 1 Paige, 262.
[2] MS. V. Ch. 4th circuit.
[3] Osgood v. Osgood, 2 Paige, 624. Morrell v. Morrell, 2 Barb. S. C. R. 480. Collins v. Collins 2 Paige, 9.
[4] Laurie v. Laurie, 9 Paige, 234.
[5] Id.
[6] Collins v. Collins, 2 id. 9.
[7] Codd v. Codd, 2 J. Ch. R. 141.

right to alimony, the custody, care and education of the children, as well as their legitimacy, and the costs of the litigation, remain to be disposed of by the court.

If the separation be granted, at the suit of the husband, for cruelty to him, and consequently the wife be found to be the guilty party, the court has no power to order the husband to provide for her support.[1] And in case the divorce be for the adultery of the wife, we have already seen that by the statute the husband's interest in her real and personal estate is not affected by the decree;[2] and that she forfeits her title to dower in his estate.

With respect to the amount which shall be allowed to the wife out of her husband's estate, upon a divorce for the adultery of the husband, or for his cruelty towards her, the general rule was stated by Chancellor Kent, on one occasion, to be, to allow the wife a third, or at least a fourth part of the income of the husband's real estate, and that it is in the power of the court to vary the allowance, from time to time, according to the circumstances of the parties.[3] In a case before Chancellor Walworth, the court allowed an annuity, equal to the value of one third of the husband's property at six per cent, and would have allowed her the value of one half, if she had been discreet, prudent and submissive to her husband.[4] The case shows that the prior conduct of the wife, though not a justification of the defendant's conduct, will not be without its influence, in fixing the final alimony in the case.

This subject underwent much discussion before the vice chancellor, the chancellor and the court of errors, in a celebrated case, where the amount was fixed by the vice chancellor, without a reference.[5] In that case it was left in doubt whether, upon a decree for a divorce or separation, the court could award a gross sum for alimony, instead of an annuity, as is generally done. The vice chancellor intimated that an annuity only could be granted, and the chancellor waived, as immaterial on that appeal, a discussion of the question, and the point was thus left undecided by him.[6] The annuity allowed by the vice chancellor was $10,000 a year, to commence at the date of the decree. On an appeal by the defendant, the chancellor affirmed the decree, with a modification, directing the annuity to commence from the filing the bill, and in computing the arrearages, to deduct the *ad interim* alimony which had been received by her or her solicitor. The effect of this modification was to add about $12,000 to the

[1] Palmer v. Palmer, 1 Paige, 276. Perry v. Perry, 2 Barb. Ch. R. 311.

[2] 2 R. S. 146, § 47, and see ante.

[3] Miller v. Miller, 6 J. Ch. R. 91.

[4] Peckford v. Peckford, 1 Paige, 274.

[5] Burr v. Burr, 10 Paige, 22; affirmed 7 Hill. 207.

[6] Burr v. Burr, 10 Paige, 26, 37

decree of the vice chancellor. The chancellor also directed that the wife should have the power to dispose of any portion of it that might remain at her death, by will or otherwise, in case the husband should survive her. The decree of the chancellor was affirmed by the court of errors.

This case was peculiar in its character, "and if ever a case called for an extraordinary allowance," said the chancellor, "this is one; for I think it is without a parallel in this or any country." It was a bill filed for a separation by the wife for cruel treatment by the husband. The conduct of the wife was shown to have been exemplary, and unexceptionable, during the marriage. She was shown to have brought to her husband at the marriage a sum of money, which, had it been then invested, would have produced, at the time of the decree, an annuity of two thousand dollars a year. The estate of the husband was from half a million to a million of dollars, and but one person who had any claims upon his bounty.[1] The English decisions show that from a third to a moiety is often allowed in this class of cases, and that the element of punishment for the husband's misconduct, as in actions where exemplary damages are allowed at law, has in some instances prevailed; as seems to have been countenanced in this case, both by the vice chancellor and chancellor, and by the majority of the court of errors.[2]

We have hitherto considered the relief which equity affords to the wife, on a divorce or separation, *out of the estate of the husband*. It remains that something be said with respect to the protection which the court affords the wife against the claim of the husband or his creditors *to her property*, and of its power to restore it *to her*. The jurisdiction, in this respect, does not rest upon the statutes of 1848 and 1849 for the more effectual protection of the property of married women, but springs from the principles of natural justice, and which are declared also by the Revised Statutes.[3] The court in these cases considers the husband as having, by his misconduct and criminality, forfeited all right to the wife's property, which he acquired by virtue of the marriage, whether the same be in possession or in action. And upon the ground that she is in equity entitled to a restoration of the property, which he has forfeited by

[1] See opinion of V. Ch. 10 Paige, 26 to 29, where the facts are stated.

[2] Mytton v. Mytton, 3 Hagg. Ecc. R. 656. Smith v. Smith, 2 Phill. 237. Case of Earl of Pomfret, decided at the Arches court in 1796, and found in Smith v. Smith, supra. Otway v. Otway, 2 Phill. R. 109

[3] Holmes v. Holmes, 4 Barb. 295 Van Duzer v. Van Duzer, 6 Paige, 366 Fry v. Fry, 7 id. 461. Renwick v. Renwick, 10 id. 420. 2 R. S. 146, 147. Meehan v. Meehan, 2 Barb. S. C. R. 377. Sacket v. Giles, 3 Barb. Ch. R. 204.

a willful breach of the marriage contract, the court may, upon a dissolution or permanent suspension of the marriage contract, restore to the injured wife the whole of her property, which has not already passed into the hands of *bona fide* purchasers. Upon the ground, also, that her equitable claim relates back to the time of the commission of the offense which entitled her to a divorce or suspension of the marital rights of the husband, the court may not only protect that equity against the husband himself, but also against all others except *bona fide* purchasers, or those who have obtained a *specific lien* upon the property without notice of her equitable rights, and that she intended to enforce them by a bill for a separation. A judgment creditor who has only a general lien, and which accrued subsequently to the husband's forfeiture of his marital rights, is not entitled to enforce it against this prior equity of the wife.[1]

Though the right of the wife to the immediate use of her land, if she establishes her right to a decree of separation, be superior to the liens of the judgment creditors of her husband, yet if the husband's interest be sold under the judgment while the parties are living together as man and wife, and the purchaser or redeeming creditor has no notice of the wife's right to a separation, he is entitled to protection as a *bona fide* purchaser. The right of the husband to redeem being expired, the wife cannot redeem in the three months thereafter; and it is immaterial to her whether the purchaser or a redeeming creditor acquires the legal title.[2]

With regard to the care and custody of the children, after a final decree for a divorce or separation, the object is not to gratify the wishes of the parents merely, but to protect and provide for the children of the marriage, whose condition cannot fail to awaken the sympathy of the court.[3] In the last mentioned case, the divorce having been granted for the adultery of the husband, the care and custody of the infant daughter of the marriage was given to the mother. In other cases, where the divorce was for the cruelty of the husband, the custody of the infant children was, under the circumstances, given to the mother.[4] The right of the father to the custody of his infant children, independently of a bill for a divorce or separation, may be lost by his misconduct; and equity has an undoubted right so to dispose of the question as will best promote their interest and welfare.[5] But the statute confers upon

[1] Van Duzer v. Van Duzer, supra, and the cases last cited.

[2] Sacket v. Giles, 3 Barb Ch. R. 204.

[3] Cook v. Cook, 1 Barb. Ch. R. 639.

[4] Codd v. Codd, 2 J. Ch. R. 141. Barere v. Barere, 4 id. 187.

[5] See ante. Mercein v. The People 25 Wend, 64, 103. Wellesley v. Beaufort, 2 Russ. Ch. C. 1.

the court, which pronounces the decree, ample power to make order as between the parties for the custody, care and education of the children of the marriage, as may seem necessary and proper, and may at any time thereafter annul, vary or modify such order.[1] Though it may be improper to entrust the custody of an infant daughter to a parent who has been convicted of adultery and divorced for that cause; yet the statute contemplates that there may be a reformation of conduct, or other change of circumstances, which would justify a change of the order, or a modification of it.

In actions of this kind the question of costs has always been in the discretion of the court, and is still so left by the Code of Procedure. It is usual that the prevailing party recovers costs. But if the wife fails in her suit no decree can be made against her for costs, if she has no separate estate.[2] The next friend of the wife, complainant, is liable for her costs, in case she fails in her action, and costs are allowed. And on an appeal by the husband, against whom a decree has been pronounced, the bond for costs must be given to the next friend of the plaintiff, or to some officer of the court in trust for the wife.[3]

SECTION III.

OF IDIOTS, LUNATICS, PERSONS OF UNSOUND MIND, AND PERSONS INCAPABLE OF CONDUCTING THEIR OWN AFFAIRS, IN CONSEQUENCE OF HABITUAL DRUNKENNESS.

THE subject of mental capacity arises in several ways. In courts both of law and equity a direct issue may be made, as to the capacity of a party to make a contract, or of a testator to make a will, and in these cases the rules of law and equity are the same.[4] In courts of criminal jurisdiction, the question may arise with respect to the responsibility of the accused for his acts charged as criminal, and in this case the same rule seems to prevail that is recognized with reference to contracts. The question may also arise, in an action of false imprisonment, for committing the party to the charge of a lunatic asylum. And it is necessarily involved in every proceeding under the statute for the safe keeping and

[1] 2 R. S. 148, § 59.

[2] Perry v. Perry, 2 Paige, 501. Wood v. Wood, 2 id. 454.

[3] Burr v. Burr, 10 Paige, 166.

[4] Bennet v. Vade 2 Atk. 327. Osmond v. Fitzroy, 3 P. Wms. 130.

care of lunatics, whether the proceeding have reference to the security of the public against apprehended mischief, or be intended for the benefit or restoration of the person thus committed.[1]

The discussion of the subject, under the foregoing aspects, belongs more appropriately to works devoted exclusively to the subject, or to writers on medical jurisprudence, or criminal law, than to a treatise on equity jurisprudence. The aspect in which the infirmity is viewed by a court of equity, when the object is to protect the party laboring under the disability, from his own acts, and to take the guardianship of his person and estate, is in some respects different from the light in which it appears to a tribunal, where the sole question is whether the party, whose conduct is in question, had sufficient mental capacity to make a deed, or perpetrate a crime. A party may, perhaps, properly be the subject of medical treatment, at an asylum for the insane, who at the time is responsible for his crimes, and whose contracts could not be successfully assailed. The object there is to remove the disease, in its incipient stages, rather than to protect society, or the individual himself, from meditated acts of violence. In modern times the courts of equity have upheld inquisitions as entitling the party to the protection of the court, and subjecting his person to its control, which a century ago would have been quashed.[2]

The nature and origin of the jurisdiction of the court of chancery in England, over idiots and lunatics, do not very clearly appear; though the better opinion is, that the custody of that class of persons, being a branch of the prerogative, the appointment of the committee necessarily devolved on the person to whom that branch of the prerogative was entrusted.[3] Though the jurisdiction in the case of idiots was anciently, in some respects, different from that of lunatics, yet practically, the difference, in modern times, is of no essential importance; and in this state, if it ever existed, no trace of it remains in our jurisprudence at this day.

By the Revised Statutes, the care and custody of all idiots, lunatics, persons of unsound mind, and persons incapable of conducting their own affairs, in consequence of habitual drunkenness, and of their real and personal estates, were vested in the chancellor, and now, by the constitution of 1846, in the supreme court. By statute, the court is to see that their estates be not wasted or destroyed, and to provide for the safe keeping and maintenance of the persons above mentioned, and for the maintenance of their families, and the education of their children, out of their personal

[1] See the statutes, 2 R. S. 37, 4th ed.

[2] Ridgeway v. Darwin, 8 Ves. 66. 67.

[3] 1 Fonb. Eq. B. 1, ch. 2, § 2, n. 2 Mad. Ch. Pr. 565.

estates and the rents and profits of their real estate respectively.[1] Under the former constitution, the vice chancellors in their respective circuits had concurrent jurisdiction with the chancellor, subject to his appellate jurisdiction, of all matters of this kind.[2] And under the present constitution, the county courts of the respective counties have concurrent jurisdiction with the supreme court, subject to appeal to the latter court, of "the care and custody of the person and estate of a lunatic, or person of unsound mind, or an habitual drunkard, residing within the county of which he is such judge."[3]

Although, in this state, it is of no importance whether a party be found an idiot, a lunatic, or a person of unsound mind, who is incapable of conducting his own affairs, as the same consequence results from either finding; yet, as the terms idiocy and lunacy frequently occur in the books, it may be expedient briefly to define them, in connection with the other expression in the statute, *unsound mind*.

An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. By the old common law, there was a writ *de idiota inquirendo*, to inquire whether a man be an idiot or not; which was tried by a jury of twelve men, and if they found him *purus idiota*, the profits of his lands and the custody of his person were granted by the king to some subject who had interest enough to obtain them. This, according to Blackstone, was originally a branch of the king's revenue. But few instances, it is said, can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an idiot *a nativitate*, but only *non compos mentis* from a particular time.[4] A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb and blind, is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.[5]

A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief or other accident, hath lost the use of his reason.[6] Under the general name of *non compos mentis*, which Coke says is the most legal name, are comprised not only lunatics, but persons under fren-

[1] 2 R. S. 52.
[2] Id. 168.
[3] Code of Procedure, § 30, subd. 8.
[4] 1 Bl. Com. 316, 317.
[5] Id.
[6] Id. 1 Inst. 247.

zies; or who lose their intellect by disease; and those who grow deaf dumb and blind, not being born so.[1]

At common law, it was presumed that an idiot would always remain so; but that a lunatic might perhaps be restored to his reason. But the skill of medical science has shown that the first of these presumptions is unfounded, and that the mind of the idiot is susceptible of cultivation. A beneficent provision has been made by this state, not only for the lunatic but also for the idiot; and the institutions established for these purposes have proved eminently successful, and are an honor to the distinguished names by whose auspices they have been founded.[2]

A person born deaf and dumb is not treated by us as an idiot or *non compos mentis*. He is not for that cause alone to be placed under a committee, and the presumption of incapacity is merely a presumption in his favor, to guard and protect him against imposition and fraud.[3] There are instances in this state and elsewhere, where persons born deaf and dumb have been held responsible for crime.[4]

The questions of jurisdiction, in matters of this kind, have reference to the nature and degree of mental imbecility which will justify the interference of a court of equity in awarding a commission, and in placing the person and estate of a party in the hands of a committee. The terms *idiot* and *lunatic* are technical terms, and words of well known signification; and hence there is no difficulty, when the inquisition finds the party to be either an idiot or a lunatic, in awarding a commission. But there are cases of mental weakness, which fall short of idiocy or lunacy, that sometimes claim the protection of the court, or become the ground of relief. In this class of cases, if the imbecility of mind be not sufficient of itself to invalidate a contract, it will still be a circumstance of great importance in a bill to set aside a conveyance, if it was obtained by undue influence, if the consideration was inadequate, or if the grantee stood in such relation to the grantor, that the obtaining of the deed was a breach of confidence reposed in the former by the latter. This class of cases has been elsewhere considered. If the mental incapacity be such, that it would not justify a jury in finding the grantor to be of unsound mind, within the meaning of the statute, equity will not set aside the deed for imbecility alone.[5]

As the statute confers on the court jurisdiction over idiots, lunatics,

[1] 1 Bl. Com. 317. 1 Inst. 246, 247. 26 Wend. 299.

[2] See the various statutes on these subjects and the report of the managers to the Legislature.

[3] Brower v. Fisher, 4 J. Ch. R. 441.

[4] MS.

[5] Sprague v. Duel, 11 Paige, 180.

persons of unsound mind and habitual drunkards, it becomes important to inquire what is meant, in this connection, by the words *unsound mind.* There are doubtless various degrees of unsoundness, from idiocy to the slightest defect. Indeed it was said on one occasion by Dr. Haslam, who, after years of professional observation of the phenomena of mental disease, replied to the question, "Was Miss B. of sound mind?" that he never knew any human being who was of sound mind.[1] When the term, unsound mind, has reference to the capacity of the party to make a deed or a will, the courts in this state have held it to be synonymous to idiocy and lunacy, as importing a total deprivation of memory and understanding.[2] But it is to be observed, that in the statute of wills, all persons have the power thus to dispose of their property, except idiots, persons of unsound mind, married women and infants.[3] The term *lunatic* is not mentioned, and is obviously embraced in the term *unsound mind.*[4]

But the statute under consideration, after using the well known terms, idiot and lunatic, adds that of *persons of unsound mind.* If the latter term does not comprise cases not found in the former, the words are senseless and unmeaning. In one case the chancellor admitted, that mental imbecility may exist in various degrees, between absolute idiocy and the ordinary state of mental capacity, as it exists among mankind in general. But he said in the same case, that to constitute a case of unsoundness of mind, which will justify the court in taking the person and property of a freeman into its possession, and committing them to the custody of another, his mind must be so far impaired that if it had never been elevated above that state of capacity from his birth, it would have constituted a case of idiocy.[5] If this be so, the term *unsound mind,* in the statute, is merely synonymous with idiocy.

The case which the chancellor was considering did not call for any such decision, and it is believed that the remark quoted cannot be supported to that extent. In the case before him, the finding of the jury was, to a commission in the nature of a writ *de lunatico inquirendo,* that *the party against whom it issued was incapable of managing his affairs, or governing himself, in consequence of mental imbecility and weakness.* And upon this inquisition, an application was made to the chancellor for the appointment of a committee of his person and estate, which he denied,

[1] See his remarks quoted by Verplanck in Stewart v. Lispenard, 26 Wend. 303.

[2] Stewart v. Lispenard, id 225. Blanchard v. Nestle, 3 Denio, 37. Osterhout v. Shoemaker, id. n. Petrie v. Shoemaker 24 Wend. 85. Jackson v. King, 4 Cowen, 207. Clark v. Fisher, 1 Paige, 171.

[3] 2 R. S. 56, § 1.

[4] See the preceding cases.

[5] In the matter of Morgan, 7 Paige, 237.

and ordered a new commission to issue in the usual form. The chancellor thought that unless the jury could find, in terms, as in the case of Barker, before Chancellor Kent, that the party was of "*unsound mind*, and mentally incapable of governing himself or of managing his affairs," the court ought not to interfere with the person or property of the alleged lunatic. The question whether the jury should be held to find the party of *unsound mind*, in the language of the statute, is quite a different thing from the question, whether the terms *unsound mind* and *idiot*, as used in the statute, are of the same meaning, or import the same thing.

It is admitted that the earlier chancellors of England, in the exercise of their jurisdiction over persons incapable of taking care of themselves, confined themselves to cases of strict idiocy and lunacy. Accordingly Lord Hardwicke held an inquisition, which found that the alleged lunatic, from weakness of mind, was incapable of governing himself, or his estate, to be insufficient.[1] In that case, the chancellor remarked, that he was glad to find, upon search, that except in two or three instances, the return had been *lunaticus*, or *non compos mentis*, or *insanæ mentis;* or, since the proceedings have been in English, of unsound mind. He added that he desired they should continue so, or otherwise it would introduce great uncertainty.[2]

About the same time, the same chancellor quashed a return which found the alleged lunatic not of sufficient understanding to manage his own affairs; and another, in which the jury found him to be "worn out with age, and incapable of managing his own affairs."[3]

The reason for adhering to so great strictness was doubtless in part, as suggested by Lord Hardwicke in Barnsley's case, the desire of maintaining the prerogative of the crown in its just and proper limits, and to prevent it from being extended so as to restrain the liberty of the subject and his power over his own person and estate, further than the law would allow;[4] and in part, as suggested by a learned judge of the supreme court in the matter of Mason, already cited, that in England the inquisition is traversable, as a matter of right, and a departure from the ancient forms would lead to uncertainty and confusion. Neither of these reasons apply to our practice. The prerogative of the crown, to which the people have succeeded, has no existence in any sense in which it can work a prejudice

[1] Ex parte Barnsley, 3 Atk. 168. In the matter of Mason, 1 Barb. S. C. R. 439, per Harris, J.

[2] Id.

[3] Id. Lord Donnegal's case, 2 Ves. sen. 401, A. D. 1751. Bridgman's Index, tit. Lunatics, &c., 275.

[4] Id.

to individuals, and the right of traverse does not exist at all; and the award of an issue rests in the discretion of the court.[1]

The earliest departure from the strict technical rules insisted on by Lord Hardwicke, relative to these commissions, occurred in the time of Lord Eldon, in the commencement of the present century. On that occasion his lordship laid down the principle, that evidence might support a commission, not of lunacy, but in the nature of a writ *de lunatico inquirendo;* in which it must be remembered, that it is not necessary to establish lunacy, but it is sufficient that the party is incapable of managing his own affairs.[2] In a subsequent case, a year later, a commission of lunacy having been issued against a lady under which the jury found she was not a lunatic, and was sufficient for the government of herself, and her estate; upon a petition that the verdict was not supported by the evidence, and that the jury had proceeded upon the notion that this commission could only be applied to a case of actual insanity, the chancellor, after personal examination and reading the evidence, from which the nature of the case appeared to be imbecility of mind, in a great degree proceeding from epilepsy, remarked, that the court, in Lord Hardwicke's time, did not grant a commission of lunacy in cases in which it had since been granted. And he observed, that of late the question has not been, whether the party is absolutely insane; but the court has thought itself authorized to issue the commission, provided it is made out that the party is unable to act with any proper and provident management; liable to be robbed by any one; under that imbecility of mind not strictly insanity, but as to the mischief, calling for as much protection as actual insanity.[3] The subject underwent a further investigation by Lord Erskine in 1806, in a case which has often been quoted with approbation in this country.[4] In that case, the first inquisition found that Cranmer was so far debilitated in his mind as to be incapable of the general management of his affairs, but did not find that he was of *unsound mind*, and for this reason the inquisition was quashed, and another commission awarded, under which the jury found that Cranmer was of *unsound mind, and not sufficient for the government of himself and his estate.* And the chancellor, in upholding the latter finding, held that the commission of lunacy was applicable to incapacity, from causes distinct from lunacy, such as old age, sickness and the like, but that the return, if not in the words of the commission,

[1] Matter of Mason, 1 Barb. S. C. R. 436. Matter of Tracy, 1 Paige, 580. In the matter of Wendell, 1 J. Ch. R. 600.

[2] Gibson v. Jeyes, 6 Ves. 272.

[3] Ridgeway v. Darwin, 8 Ves. 65.

[4] Ex parte Cranmer, 12 Ves. 445. Matter of Barker, 2 J. Ch. R. 445. Matter of Morgan, 7 Paige, 238.

must have equivalent words; and in such cases the proper return is, that the party is of unsound mind, so that he is not sufficient for the government of himself and his estate.

A similar question came before Lord Lyndhurst in 1827.[1] Under a commission of lunacy issued against Mr. Holmes, the jury found, "that the Rev. William Holmes is not a lunatic, but that partly from paralysis and partly from old age, his memory is so much impaired, as to render him incompetent to the management of his affairs, and consequently of unsound mind, and that he has been so for the term of two years last past." Upon this finding a petition was presented for the appointment of a committee and a cross petition by other parties to quash the inquisition. The ground of the latter motion was, that the verdict was no answer to the inquiry which the jury were directed to make. The chancellor, after reviewing the cases before Lord Eldon and Lord Erskine, and approving of them, said, "that the finding in this case was *consequential*, the impaired memory of the party being the foundation of it. The jury state one of the effects or consequences of unsoundness of mind, and they thence draw the conclusion of unsoundness. Where a jury state their premises and draw their conclusion, and that conclusion does not *necessarily* follow from the premises which they state, we must not take the conclusion as a finding by itself."

Upon the ground that the verdict was not in the accustomed form, and that the consequences stated by the jury did not necessarily follow from the premises, his lordship quashed the inquisition, and ordered a new commission to issue.

The finding in this case was *argumentative*, and not direct and positive. Had the jury found Mr. Holmes of unsound mind, the facts which they also found, to wit, "that partly from paralysis and partly from old age, his memory is so much impaired, as to render him incompetent to the management of his affairs," would have been ample to justify and uphold the finding. Accordingly, on the new commission in that case, the jury found Mr. Holmes of unsound mind, in the language of the commission; and we hear of no further objection to it.

In all cases the verdict should respond to the questions which the jury are sworn to try. A demand and refusal are sufficient evidence, in an action of trover, to warrant the jury in finding a conversion; but the court cannot give judgment on a verdict which merely finds a demand and refusal. Such verdict is neither a special or a general verdict; it is an imperfect verdict

[1] In re Holmes, 4 Russ. 182.

It is presumed that a special verdict is inadmissible in a commission of the nature we are considering.

The doctrine of Lord Eldon and Lord Erskine was approved by Chancellor Kent as early as 1816.[1] In the case of Barker, upon a petition by the children, that the said Barker had been for four months past so far deprived of reason and understanding, as to be wholly unfit and unable to manage his affairs, and praying that a commission in the nature of a writ *de lunatico inquirendo* might issue, the chancellor, after an able review of the whole subject, awarded the commission to inquire whether Barker was of unsound mind, and mentally incapable of managing his affairs. The jury found "that for one year preceding he was of unsound mind, and mentally incapable of managing his affairs." And the chancellor, upon that finding, appointed a committee.

The doctrine of this case was approved by Chancellor Walworth in a case before him, already cited.[2] In that case the commission, in the nature of a writ *de lunatico inquirendo*, directed the jury to inquire whether Morgan, who was alleged to be of unsound mind, was a lunatic or idiot, or of unsound mind, and mentally incapable of governing himself and managing his affairs. The jury found "that he was incapable of managing his affairs or governing himself, in consequence of mental imbecility and weakness, and that he had been so incapable for two or three years." Upon this inquisition an application was made for the appointment of a committee of the person and estate, but the motion was denied, and a new commission directed to be issued.

The chancellor held that the jury must distinctly find that the alleged lunatic was of *unsound mind*, as well as mentally incapable of governing himself or of managing his affairs. It is quite obvious that the finding in that case was imperfect. It left the court to draw the conclusion, which the jury were sworn to find.

In a case before the vice chancellor of the first circuit, in 1840, the same doctrine was again held.[3] In that case the jury found, that the said "Mason, at the time of the taking of this inquisition, is so far weakened and impaired in the faculties of his mind, as to be mentally incapable of the government of himself and of the management of his goods and chattels, lands and tenements, business and affairs, and that he had been so for four years." Upon a motion to appoint a committee, the vice chancellor said that the finding was not strictly correct, as it omitted to

[1] In the matter of Barker, 2 J. Ch. R. 232; and see Matter of Wendell, 1 id. 600.

[2] In the matter of Morgan, 7 Paige 236.

[3] In matter of Mason, 3 Edw. 380.

find that Mason was of *unsound mind*, in the language of the statute. After showing what the inquisition should have found, according to the established practice, instead of quashing it and ordering a new commission, he directed a copy of it to be served with notice for the appointment of a committee, and that it should be explained to the alleged lunatic; and if no opposition was made, he said he would appoint a committee, which he accordingly did. This case, on the adoption of the present constitution, was transferred to the supreme court, and the decision of the vice chancellor was called in question in the latter court in 1847, by a petition to set aside the proceedings, which was denied. In delivering their judgment, it was intimated by the learned judge that it might, perhaps, have been better if the vice chancellor had required a further commission; and he expressed his concurrence in opinion with Chancellor Walworth, in Morgan's case, already cited, that it is not wise to depart from the technical form of finding in the language of the statute itself. Yet, he said, he could not say, that under the circumstances, as they appeared before the vice chancellor, it was an indiscreet exercise of his undoubted power; that it was a question of discretion and not of jurisdiction, and if the vice chancellor erred, his error could only have been corrected by an appeal.[1]

Some of the New-York cases were before, and others since the Revised Statutes were adopted, conferring jurisdiction on the court to grant a commission in cases of idiocy, lunacy and unsoundness of mind. Since the English cases referred to were decided, the British statutes on the subject of idiocy and lunacy were, in the reign of William the 4th, consolidated and revised; and they now, like the New-York statutes, recognize *unsoundness of mind* as one of the grounds for issuing a commission, thus adopting, by parliamentary authority, the doctrine of the court of chancery which had prevailed for more than thirty years before.[2]

From the foregoing view of the cases, it seems that unsoundness of mind, short of idiocy or lunacy, will uphold a commission and justify the court in committing the person and estate of a person, found of unsound mind, and incapable, for that cause, of the management of his person and estate, to the care and custody of a committee. That this state of mind may fall short of idiocy or lunacy, appears from several of the cases.[3] The proper finding of the jury in such cases is, that the party proceeded against is of unsound mind, an idiot or a lunatic, as the case may be, so

[1] In the matter of Mason, 1 Barb. S. C. R. 436, 442.

[2] See acts, 1 Will. 4, ch. 60, and ch. 65.

[3] Jackson v. King, 4 Cowen, 217, per Woodworth, J., and Matter of Mason, supra, &c.

that he is not sufficient for the government of himself, his lands and tenements.[1]

Writers on medical jurisprudence have complained that the term *unsoundness of mind*, unlike idiocy and lunacy, does not convey a distinct and definite idea.[2] The fault here is not in the law, but arises from the nature of the subject itself. No two cases are perhaps ever alike. A man may be mentally incapable of managing his affairs, or the government of his person, who is not totally deprived of memory and understanding. If the evidence of imbecility of mind be such that the party is incapable of the government of his person and his estate, the jury can find from such evidence the unsoundness of mind, which the statute contemplates, as the ground for the interposition of the court. Writers may disagree as to the name by which that state of mind shall be designated. The fact of its existence must be found, in direct terms, by the inquisition, and not by way of argument or circumlocution. The jury must draw the conclusion from the evidence, and not leave it to be inferred by the court.

Having thus shown on what grounds a commission may be issued by the court, in the nature of a commission of lunacy, it may be proper to add some observations on the subject of taking the inquisition and on various other topics connected with the subject; and on superseding it, when the party against whom it issued has recovered his senses.

It seems formerly to have been doubted whether a commission could issue against a non-resident. In Southcote's case,[3] a commission of lunacy was ordered against a person who was in France, to be executed in Essex, where his mansion was. But the commission must be executed in the state, and notice should be given to the lunatic, of the time and place of its execution.[4] If the lunatic be a non-resident of the state, the fact of his having property here must be stated in the petition. The lunatic should be brought before the jury, who have a right to examine and inspect him, and they should exercise this right in every case of doubt. And the person who has the custody of the lunatic, is bound to produce him, or to permit him to attend. The person who disobeys this order,

[1] In matter of Mason, 3 Edw. Ch. R. 381. Shelf. Law of Lunatics, 108, 109. Ridgeway v. Darwin, 8 Ves. 66, 67. In re Holmes, 4 Russ. 182.

[2] 1 Beck's Med. Juris. 577. Guy's Med. Jur. 288, 289.

[3] Ambler 109.

[4] Matter of Petit, 2 Paige, 174. Matter of Ganse, 9 id. 416. Matter of Fowler, 2 Barb. Ch. R. 305. Matter of Perkins, 2 J. Ch. R. 124. Matter of Tracy, 1 Paige, 580.

whether proceeding from the commissioners or the court, does so at his peril.[1]

With regard to the traverse of an inquisition, it has already been stated that this is not a matter of course in this state. In England this is matter of right. But here, as the whole jurisdiction is in the court, and the object is to inform the conscience of the court, and arrive at the truth, the directing an issue to be tried, under the direction of the court, has been thought preferable to a traverse according to the English method The granting or withholding such an issue, rests in the sound discretion of the court.[2] The court never grants leave to traverse the inquisition, when the application is made in the name of the lunatic, without a private examination of the lunatic by the chancellor, or a report of a master who has made the examination. But the court will permit a purchaser, whose purchase is overreached by the inquisition, to traverse it, on stipulating to be bound by the final decision thereon.[3]

The committee of a lunatic appointed abroad, has no authority over his property in this state. Chancellor Kent suggested that such commission, issued in another state, might be sufficient to warrant the issuing of a commission here.[4]

With respect to the selection of the jurors to try the question of sanity, the law confides this duty to the sheriff, and it is irregular for the commissioners to dictate to him in the matter.[5] The jurors should be indifferent in relation to the subject in controversy, and the commissioners must decide upon the validity of any challenge that may be made to any of them.[6] After the testimony is closed, the commissioners should submit the matter to the jury, in the form of a charge, stating the law applicable to the case, and recapitulating the facts if necessary, but without arguments on either side. Twelve of the jury must agree one way or the other, and if twelve cannot agree, the jury must so report to the commissioners, that their return may be made accordingly. A majority of the commissioners may decide any legal question arising in the proceeding.[7]

During the deliberations of the jury it is improper for the sheriff to

[1] Matter of Russell, 1 Barb. Ch. R. 38. Lord Wenman's case, 1 P. Wms. 701. Ex parte Ludlow, 2 id. 638.

[2] Matter of Wendell, 1 J. Ch. R. 600. Matter of Tracy, 1 Paige, 580. Matter of Russell, 1 Barb. Ch. R. 38. Matter of Christie, 5 Paige, 242.

[3] Id. Matter of Giles, 11 Paige, 243.

[4] Matter of Perkins, 2 J. Ch. R. 124. Matter of Petit, 2 Paige, 174. Matter of Ganse, 9 id. 416.

[5] Matter of Wager, 6 id. 11.

[6] Id.

[7] Matter of Arnhout, 1 id. 497.

be in the room with them, or to converse with them at all in relation to the matter under consideration. If so directed by the commissioners, it is his duty to guard the jury room, and prevent their being intruded upon by others. Where he violated his duty by entering the room and conversing with them on the matter before them, the inquisition was set aside and a new commission awarded, with an order that the coroner summon the jury.[1]

The proceedings on a commission to inquire whether the party is incapable of conducting his affairs, in consequence of habitual drunkenness, are conducted in the same way as an inquiry as to the idiocy, lunacy or unsoundness of mind of the party. The jurisdiction of the court of chancery over the persons and estates of habitual drunkards, was first given by the act of 1821, (L. p. 99,) and it was assimilated to the jurisdiction which the court already exercised over the persons and estates of lunatics. At the revision of the laws in 1830 this provision was retained, with some modifications. The overseers of the poor of any city or town, who shall discover any person resident therein, to be an habitual drunkard, having property to the amount of two hundred and fifty dollars, which may be endangered by means of such drunkenness, are required to make application to the court of chancery, now the supreme court, for the exercise of its powers and jurisdiction.[2] And if such drunkard have property to an amount less than two hundred and fifty dollars, the application is to be made to the court of common pleas of the county, now the county court, which for this purpose is vested with the powers of the court of chancery. In vacation of the common pleas, the application was allowed to be made to the first judge, but this latter proceeding is now superseded by the code, which enables the county court to take jurisdiction of these cases, whatever the amount of property of the drunkard, provided he resides in the same county of the judge.[3]

The traverse of an inquisition finding a party an habitual drunkard is not the formal traverse spoken of in the English works, but is an issue directed by the court, to inform its conscience, and is always proper in cases of doubt, especially under the act relative to habitual drunkards.[4]

With regard to the finding, in cases under the latter statute, the chancellor said, in the last mentioned case, that a very erroneous impression appears to have gone abroad on the subject. It is supposed by many, he

[1] Matter of Arnhout, 1 J. Ch. R. 497.
[2] 2 R. S. 52, § 2.
[3] Id. §§ 3, 4. Code of Procedure, § 30, subd 8.
[4] Matter of Tracy, 1 Paige, 582. Matter of Russell, 1 Barb. Ch. R. 38.

observed, that the prosecutor, in such cases, is bound to prove affirmatively that an habitual drunkard is incapable of managing his affairs. On the contrary, the fact that a person is for any considerable part of his time intoxicated, to such a degree as to deprive him of his ordinary reasoning faculties, is *prima facie* evidence, at least, that he is incapable to have the control and management of his property.[1] It would seem, therefore, that evidence which establishes the fact that a man is an habitual drunkard, will authorize the jury to find the other fact that he is, by reason of such habitual drunkenness, incapable of conducting his own affairs. In analogy to the cases of incapacity, resulting from idiocy, lunacy, or unsoundness of mind, the finding of both facts would seem to be necessary to justify the placing the person charged, and his property, in the hands of a committee. A finding, in the language of the statute, includes the finding of both facts.

The control which the court may, by its committee, exercise over the person of one who is found incapable of conducting his own affairs, in consequence of drunkenness, is the same which it may exercise over an infant, an idiot or a lunatic.[2] The guardian or committee is alone to decide, subject however to the superintending control of the court, as to the proper place in which the infant, non compos or habitual drunkard shall reside; as he is liable for the consequences of a neglect to take proper care of the person committed to his care. And it is the duty of the court to lend its aid to protect him in the proper exercise of that right; and to give him directions on the subject when necessary.[3]

In accordance with these principles it has been held, that if the committee find that any person is furnishing the habitual drunkard with the means of intoxication, even gratuitously, he should apply to the court for an order restraining all persons from furnishing him with ardent spirits, or with the means of obtaining liquor, upon pain of contempt.[4]

With respect to the person to whom the guardianship of the person or estate should be committed, general fitness is to be regarded rather than the selection of one who could derive no benefit from the death of the party. In the case of the lunacy of the mother, Chancellor Kent committed the guardianship of the person to the daughter; and observed that the presumption, if one must be indulged, would be in favor of kinder treatment and more patient fortitude from her than from the collateral

[1] Matter of Tracy, 1 Paige, 582, 583.
[2] In the matter of Lynch, 5 id. 122.
[3] Id. Hall v. Hall, 3 Atk. 721. Freeman's case, 1 Str. 168. Cranmer's case, 12 Ves. 455. Lord Wenman's case, 1 P. Wms. 702.
[4] In the matter of Hiller, 3 Paige 202. Matter of Hoag, 7 id. 312.

kindred.[1] Nor is it a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death, as his heirs or next of kin. But they will be appointed, where it satisfactorily appears to the court that they are the persons who are the most likely to protect his property from loss.[2]

In most other respects the proceedings against a person as an habitual drunkard are the same as those against idiots, lunatics, and persons of unsound mind.

With respect to the management and disposition of the property of the lunatic, his interest is more to be regarded than the contingent interest of those who may be entitled to the succession; and the court, if it be for the interest of the lunatic, will direct timber on the land of the lunatic to be sold.[3] On the like principle, Chancellor Kent held, under the former statute, that the real estate of the lunatic might be converted into personal, or personal into real, for the benefit of the lunatic.[4] But since the Revised Statutes, the court cannot direct a sale of the real estate of a lunatic, except when it is necessary for the maintenance of himself or his family, or the education of his children, or the payment of his debts; nor for these purposes, if the personal estate is sufficient.[5] But the court may authorize the committee to apply the surplus income to the improvement of the unproductive real estate; and to apply a reasonable portion of the capital of the personal estate in building upon vacant lots, which will thereby be rendered productive.[6]

During the lifetime of the lunatic the next of kin have no interest in his estate. But as the lunatic, if of sufficient ability, is bound to maintain his family, and as the court is bound to see that his property is fairly devoted to that purpose, applications are not unfrequently made to the court for an order on the committee to make allowances in favor of those whom he is bound to provide for, and for other relatives of the lunatic towards whom he is under no such obligation. Lord Eldon, on one occasion, gave the following explanation of the course of the court on these applications: "When the court is called upon to make an allowance," said his lordship,[7] "it has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in case where the estate is considerable, and the persons who will be entitled to

[1] Matter of Livingston 1 J. Ch. R. 436.
[2] Matter of Taylor, 9 Paige, 611.
[3] Matter Salisbury, 3 J. Ch. R. 347.
[4] Id. 1 Vern. 483. Ambler, 419.
[5] 2 R. S. 53, § 11. Matter of Petit, 2 Paige, 596.
[6] Matter of Livingston, 9 id. 440.
[7] Ex parte Whitbread, 2 Meriv. 102.

it hereafter, are otherwise provided for, the court, looking at what it is likely the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So, where a large property devolves upon an elder son, who is a lunatic, as heir at law, and his brothers and sisters are slenderly, or not at all provided for, the court will make an allowance to the latter for the sake of the former, upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education, and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So also, where a father of a family becomes a lunatic, the court does not look at the mere legal demand which his wife and children may have upon him, and which amount, perhaps, to no more than may keep them from being a burden on the parish; but considering what the lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the court does not do this, because, they would be entitled, if the lunatic were to die tomorrow, to the entire distribution of his estate; nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the lunatic. The court does nothing wantonly or unnecessarily to alter his property; but, on the contrary, takes care for his sake, that if he recovers, he shall find his estate as nearly as possible in the same condition as he left it, applying the property, in the mean time, in such manner as the court thinks it would have been wise and prudent in the lunatic himself to apply it in case he had been capable." Upon these principles the court does not confine the allowance to such relations as the lunatic would be legally bound to provide for, but extends it to brothers and other collateral kindred, reserving to its own discretion the amount and proportions of such allowance.

The practice of making allowance out of the estate of the lunatic, in favor of persons, when the lunatic was not legally bound to maintain them, seems to have originated with Lord Eldon, but has been followed in several cases by his successors, although with some reluctance.[1] These principles have been fully approved and acted upon by the court of chancery of the state, in many cases.[2] The practice of Chancellor Walworth, where the estate of the lunatic was large and the income much more than sufficient for his support, and that of all those who had a legal

[1] In re Blair, 1 Myl. & Cr. 300. Matter of Earl of Carysfort, Craig & Phil. 76.

[2] In the matter of Willoughby, 11 Paige, 259. In the matter of Heeny, 2 Barb. Ch. R. 326.

claim upon him for support and maintenance, and where there was little or no hope that the lunatic would recover, was to make an allowance in favor of other near relatives of the lunatic who were in need of assistance. In such case it was the practice to require the adult children, who were competent to support themselves, to give a stipulation that the amounts advanced to them respectively should be brought into hotch potch, upon the death of the lunatic; if any part of his personal estate should come to them under the statute of distributions. But this latter principle was not extended to children of the lunatic who were sickly or decripid, so as to give them a special claim upon the estate of the lunatic for support.

Nor will the court confine its jurisdiction to allowances for the kindred alone of the lunatic. It has power, out of the surplus income of the estate of a lunatic, to provide for the support of persons not his next of kin, and whom the lunatic is under no legal obligation to support, when it satisfactorily appears to the court that the lunatic himself would have provided for the support of such persons, had he been of sound mind. And the court may also make an allowance, out of the income of a lunatic's estate, for the education of persons whom he had adopted as children, while he was in a sound state of mind. In like manner the committee of a lunatic may be authorized to provide for the keeping up of the lunatic's family establishment, with the same number of domestics as had been customary previous to the lunacy, and to expend for that purpose, annually, an amount not exceeding that which had been annually expended by the lunatic himself before his lunacy. And the court may also authorize the committee to pay for the support of the institutions of religion, in the church where the lunatic and his family have been accustomed to worship, such sums from time to time as the lunatic may desire him to pay for that purpose, not exceeding the amount which he had been in the habit of paying annually, before his faculties became impaired. And the court may also authorize the committee to place at the disposal of the lunatic, so long as he is capable of judging of the claims of applicants, small sums of money for purposes of charity.[1]

But the committee will not be allowed personally to expend any part of the estate of the lunatic for general charity, or objects of benevolence or of piety, for which the lunatic himself had not been in the habit of contributing specifically and regularly while he was competent to manage his own affairs.[2]

[1] In the matter of Heeny, 2 Barb. Ch. 826.

[2] Id.

An inquisition may be set aside by the court for irregularity, or it may be quashed if the facts will not justify the finding of the jury, or it may be suspended, in whole or in part, or superseded, on the restoration of the lunatic to a sound mind.

If, for example, the commissioners dictate to the sheriff whom he shall select as jurors;[1] if the commission be executed without notice to the lunatic;[2] if the sheriff, having charge of the jury, improperly enter the room and converse with them on the matter during their deliberations;[3] if the jury be denied, improperly, the right of seeing and conversing with the lunatic;[4] for these, and the like causes, the inquisition will be set aside, and a new commission issued.

If the inquisition does not conform to the requirements of the statute, by failing to find the party an idiot, or a lunatic, or a person of unsound mind, as the case may be, but is argumentative or in other respects deficient, the proper course is to quash it and to order a new commission to issue.[5]

So an inquisition having found that a person was a lunatic, and had been in the same state of lunacy from the time of her birth, the inquisition was quashed, and a new commission issued.[6] Such a finding is a contradiction in terms. The finding should have been that she was of unsound mind.

In a very clear case of mistake, or undue prejudice of the jury, the court may discharge the inquisition of lunacy upon the mere examination of the supposed lunatic, and an examination of the evidence produced before the jury, without subjecting him to the expense of an issue or traverse; but this will not be done upon ex parte affidavits, where no excuse is given for not having produced the affiants before the jury as witnesses.[7] The same rule applies where the jury err in finding that the party is not of unsound mind, and where there is no doubt, from the evidence, that they should have found the other way.[8] In the case last mentioned the finding was against the unanimous opinion of the commissioners, and was unsupported by the evidence; and the chancellor directed a new commission to the same commissioners.

If, after a party has been found of unsound mind by an inquisition,

[1] Matter of Wager, 6 Paige, 11.
[2] Matter of Tracy, 1 id. 581.
[3] Matter of Arnhout, 1 id. 497.
[4] Matter of Russell, 1 Barb. Ch. R. 39.
[5] Matter of Morgan, 7 Paige, 236. Matter of Mason, 1 Barb. S. C. R. 436.
[6] In the matter of Bruges, 1 Myl. & Cr 278.
[7] In matter of Russell, 1 Barb. Ch. R. 38.
[8] Matter of Lasher, 2 id. 97. Donnoghal's case, 2 Ves. sen. 408.

the jury, on an issue ordered by the court for that purpose, find in favor of the mental capacity of the party, the commission must be discharged, and the alleged lunatic restored to the full control of his property.[1]

With respect to an application in behalf of the lunatic to supersede the commission on the ground of his complete recovery, the practice seems to be for the lunatic himself to attend in person upon the hearing of the petition, that he may be inspected by the court. Notice of the motion must be given to the committee, together with copies of the petition and affidavits on which it is founded. The court may itself determine the question from inspection and the affidavits, or it may refer the matter to a referee to take proof of the facts, with his opinion thereon, or otherwise, and on the coming in of his report, the court decides the matter.[2] Or it may direct an issue to be made up and tried by a jury.[3] In the last mentioned case, on the petition of a lunatic for the discharge of his committee, on the ground of returned sanity, Chancellor Kent held that it was in the sound discretion of the court, to allow him to traverse the inquisition, or to try the question on a feigned issue; and where the lunacy was satisfactorily established in the first instance, and the opinion of the court, after repeated applications of the party for a discharge of his committee, remained unchanged, the trial of the question was directed to be at the expense of the lunatic or his friends, and not at the charge of his estate, which consisted of personal property only, acquired by the industry and skill of the wife, and barely sufficient for the maintenance of herself and children, and of her husband.

When the proceedings have been had against the party, and he has been found incapable of managing his affairs by reason of habitual drunkenness, the court will not discharge the committee and restore the property to the party upon proof of the fact that he is competent to manage his affairs, without evidence of a permanent reformation. As a general rule, the court of chancery, in the time of Chancellor Walworth, required as evidence of a permanent reformation, satisfactory proof that the habitual drunkard had refrained from the use of intoxicating liquors for at least one year immediately preceding the application for the restoration of his property.[4]

In order to supersede a commission, Lord Thurlow was of opinion, that when lunacy was once established by clear evidence, the party ought

[1] Matter of Giles, 11 Paige, 638.

[2] Matter of Hanks, 3 J. Ch. R. 567. Ex parte Bumpton, Moseley, 78. Ex parte Ferrars, id. 332. 2 Collinson on Lunacy, 746.

[3] Matter of McLean, 6 J. Ch. R. 440.

[4] Matter of Hoag, 7 Paige, 312.

to be restored to as perfect a state of mind as he had before; and that that should be proved by evidence as clear and satisfactory;[1] but Lord Eldon did not concur in that proposition. Something less than the same perfection of mind, he thought, would be sufficient.[2]

But as diseases of the mind are extremely insidious in their character, it is not unusual, in this class of cases, as well as in those where the proceedings are founded on the habitual drunkenness of the party, instead of superseding the commission in the first instance, to suspend its operation, in whole or in part, either indefinitely or for a limited time.[3]

It has been made a question whether a commission can be *superseded* as to the person and retained as to the estate. In this state it was held by Hand, J., that this could not be done; and Lord Cottenham, on one occasion, decided the same question in the same way.[4] But the commission may be *suspended* as to the person and retained in force as to the estate.[5] And it may be suspended in part as to the estate, so as to authorize the lunatic to make a will disposing of his property, if on examination of the lunatic and the evidence, the court is satisfied that he has so far recovered his mind as to have a testamentary capacity.[6] A committee of the person may exist, without a committee of the estate, instead of which the property may be put in the hands of a receiver.[7] In Burr's case, already referred to, the chancellor, and subsequently the supreme court, so far suspended the commission, both of the person and estate, as to allow the lunatic, from time to time, to receive portions of the income of his estate, and finally the whole income, and to invest or expend it in such manner as he should judge best, leaving the committee of the estate in other respects in the full control of the estate.[8] As was said by Lord Loughborough on one occasion, the chancellor is to administer the estate of a lunatic *tanquam bonus paterfamilias*;[9] and he might have added, that he should treat his person in the same way.

The court may appoint the same person committee of the person and of the estate, or, as is usual when the estate is large, have a separate committee for each. And although the committee of the estate cannot be allowed

[1] Att'y Gen. v. Parnther, 3 Bro. C. C. 444. 2 Mad. Ch. R. 580.

[2] Ex parte Holyland, 11 Ves. 10. Matter of Hanks, 3 J. Ch. R. 568.

[3] In the matter of Burr, 2 Barb. Ch. R. 210. Ex parte Earl Ferrars, Mosel. 332. Bac. Abr. tit. Idiots, p. 10.

[4] Matter of Burr, 17 Barb. 9. Matter of Gordon, 2 Phillips, 242.

[5] In the matter of Burr, before Harris, J. at Albany, Sp. T. 1854.

[6] Matter of Burr, 2 Barb. Ch. R. 208.

[7] Ex parte Warren, 10 Ves. 622. Matter of Russell, 1 Barb. Ch. R. 42.

[8] Matter of Burr, 2 Barb. Ch. R. 208. MS. before Willard, J. in Saratoga, Sp. T.

[9] Oxenden v. Lord Compton, 2 Ves. jr 73

for his services, as such committee, any greater or different compensation than that which is fixed by the Revised Statutes as the allowance by way of commission to executors, administrators and guardians, yet where the interest of the estate requires it, an agent or clerk may be employed under the direction of the court, upon the application of a committee, at a reasonable salary to be fixed by the court.[1] In the matter of Burr, already referred to, the committee of the estate was allowed a clerk at an annual salary, and a salary was also paid to the committee of the person. The necessity for such allowance will depend on the amount of property to be managed, and various other circumstances. In Burr's case, the amount of property was about $250,000, and the lunatic, in addition to the committee of the person, was furnished with a companion who attended him on his journeys and elsewhere, and to whom a salary was also paid.

With repect to the effect of the inquisition upon the lunatic and upon the remedies of his creditors, it is settled that all gifts and contracts made by an idiot, lunatic or habitual drunkard, after the actual finding of the inquisition, are utterly void.[2] In like manner, contracts made by him before the finding of the inquisition, which are overreached by the retrospective finding of the jury, are presumptively void.[3]

The proper way for a creditor seeking to enforce his claim against a lunatic, is by bill in equity against the committee.[4] But the lunatic may be made a party to the bill, so as to make the proceedings binding against him, if he should be restored to the control of his estate.[5]

If the remedy be at law, the permission of the court must be obtained before commencing an action to enforce it. It is a contempt of the court to commence such action without leave, after notice of the inquisition. The court will stay the proceedings in such action if it is brought without its permission.[6] But it seems the judgment obtained in an action brought against the lunatic without leave, is not void or even erroneous.[7] It cannot be enforced against the estate of the lunatic in the hands of the committee without leave of the court.[8]

In this state, by statute, receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the court, are permitted to sue in their own name, for any debt, claim or demand transferred

[1] Matter of Livingston, 9 Paige, 440.
[2] L'Amoreux v. Crosby, 2 Paige, 422.
[3] Id.
[4] Brasher's Ex'rs v. Van Cortland, 2 J. Ch. R. 242.
[5] Beach v. Bradley, 8 Paige, 146.
[6] L'Amoreux v. Crosby, 2 Paige, 422. Matter of Hiller, 3 id. 199. Matter of Hopper, 5 id. 489.
[7] Sternbergh v. Schoolcraft, 2 Barb. S. C. R. 153. Robertson v. Lain, 19 Wend. 650.
[8] Matter of Hopper, 5 Paige, 489.

to them, or to the possession and control of which they are entitled as such receiver or committee; and when ordered or authorized to sell such demands, the purchaser thereof may sue and recover therefor in his own name, but is required to give such security for costs to the defendant as the court in which the action is brought may direct.[1] But this statute does not affect the real estate of the lunatic. And the committee cannot have ejectment in his name for the lunatic's land, but it must be brought in the name of the lunatic.[2] And the lunatic is a necessary party in an action for the partition of his land.[3] The same rule applied both at law and in equity, before the statute of 1845, when the action was brought for the recovery of personal property belonging to the lunatic.[4] But the lunatic was not a necessary party to a bill brought by his committee to avoid his acts, though he might be united in the action.[5]

Idiots and lunatics are liable for their personal torts, for compensatory damages. And where an idiot destroyed a building belonging to himself and others, as tenants in common, the court having no power to sell the land to pay the damages, ordered an equitable partition of it, allowing for the damages.[6]

Where a bill is filed affecting the estate of a lunatic, if his committee has a personal interest in the controversy which conflicts with that of the lunatic, the latter should be made a party and a guardian appointed for him.[7]

For other matters on this subject, and of the doctrine of the court in relieving against contracts obtained from persons of imbecile minds, though not under a commission, reference may be had to the chapter on frauds where it is considered in several of its aspects.

[1] L. of 1845, ch. 112, § 2.

[2] Petrie v. Schoonmaker, 24 Wend. 85. Lane v. Schermerhorn, 1 Hill, 97.

[3] Gorham v. Gorham, 3 Barb. Ch. R. 24.

[4] Lane v. Schermerhorn, 1 Hill, 97 Gorham v. Gorham, supra.

[5] Id. Ortley v. Messere, 7 J. Ch. R. 139.

[6] Matter of Hiller, 3 Paige, 199. Kroom v. Schoonmaker, 3 Barb. S. C. R. 647

[7] Teal v. Woodworth, 3 Paige, 470.

CHAPTER IX.

OF THE JURISDICTION IN EQUITY IN CASES OF DOWER AND PARTITION.

COURTS of equity have exercised, from an early day, concurrent jurisdiction with courts of law, in Dower and Partition.[1] At what time this jurisdiction was first asserted it is perhaps impossible, at this day, accurately to determine; nor is it a matter of any importance. There are many cases where the remedy at law, both in dower and partition, was imperfect. There were other cases, where the aid of courts of equity was necessary for the purpose of discovery; and in both actions, equity afforded a safer, better, more certain and expeditious remedy, than could be obtained by the dilatory and cumbersome proceedings of the actions at common law.

Questions in relation to dower often arise in actions of partition, and courts of equity can settle and adjust, in one action, the rights of all parties to the property which is to be divided. In many cases there is an indispensable necessity for the exercise of this jurisdiction in dower and partition,[2] and without it the remedy would be wholly ineffectual.

For these reasons we shall treat of both subjects in one chapter, though under distinct heads, where they are not necessarily blended.

SECTION I.

OF DOWER.

In this state it is enacted that a widow shall be endowed of the third part of all the lands, whereof her husband was seised of an estate of inheritance, at any time during the marriage.[3] This is precisely the dower

[1] 1 Mad. Ch. Pr. 197.

[2] Hartshorn v. Hartshorn, 1 Green's Ch. R. 349.

[3] 1 R. S. 740, § 1.

at common law spoken of in the books.[1] The other species of dower, which occasionally existed in England, never formed any part of our jurisprudence.

The common law remedy to recover dower, formerly existing in this state, was the writ of dower *unde nihil habet*, and lay only against the tenant of the freehold.[2] It was a dilatory, expensive and complicated remedy.[3] It was one of the *real actions* known to the law, in distinction from actions *personal* and *mixed*.

At the revision of the laws of this state in 1830, all writs of right, writs of dower, writs of entry and assize, &c. and all other real actions known to the common law, not enumerated; and all writs and other process formerly used in real actions and not specially retained, were abolished.[4] The only ancient action retained was nuisance, and that only in a modified form.[5]

As a substitute for the real actions originally provided to recover real estate, and for the action of dower, ejectment was retained, freed from the fictions which encumbered it under our former practice, and greatly improved in other respects. Ejectment, after the revision of the statutes in 1830, became the ordinary common law action for the recovery of dower; and hence all the former complicated forms of pleading in the action were abolished. In one case since the revision, it was doubted whether ejectment for dower would lie against any other person than the tenant of the freehold.[6] On a more full consideration and discussion of the subject at a later day, the court held that ejectment for dower, like that action founded upon any other title, would lie, and indeed must be brought against the *person in possession*, if there be one, whether he be seised of a freehold, or possessed of a term for years or a less estate. By giving ejectment it was thought that the statute gives all its practical incidents; and it is of the nature of the action that it will not lie against the tenant of the freehold unless he be in the actual possession.[7] If the premises are unoccupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit.[8]

In addition to the action of ejectment, just mentioned, the Revised Statutes provide for the admeasurement of the widow's dower, if it be

[1] Co. Litt. 30 b, 31. Bac. Abr. tit. Dower. 2 Bl. Com. 129.

[2] Hurd v. Grant, 3 Wend. 340.

[3] See Allan v. Smith, 20 J. R. 477; S. C. 1 Cowen, 180, for the pleadings and practice in that action.

[4] 2 R. S. 343, § 24.

[5] Id. 332.

[6] Shaver v. McGraw, 12 Wend. 558.

[7] Sherwood v. Vandenberg, 2 Hill, 307.

[8] 2 R. S. 304, § 4.

not assigned to her within forty days after the death of her husband, on an application by petition to the supreme court, the county court, or the surrogate of the county in which the lands lie.[1] The widow to whom dower shall be admeasured under the statute, at the expiration of thirty days from the date of the confirmation, may bring an action of ejectment to recover the possession of the lands so admeasured to her for her dower, in which action her right to such dower may still be controverted, and upon recovery she may hold the same during her life, subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession.[2] This proceeding is only between the widow and the owners of the freehold, and it settles only the portion to which she is entitled in severalty, if her right shall not be successfully resisted in her subsequent action to obtain the possession; and as to that, it is conclusive.[3]

Admeasurers of dower cannot take into consideration any gifts of the husband to her to diminish her dower; nor can they go into an inquiry whether the husband had made a settlement on his wife in lieu of dower.[4]

It does not belong to our subject to treat more at length of the widow's remedy at law. From what has been said, it is obvious that there are cases where the remedy at law is extremely imperfect and inadequate, and others, where it can only be asserted in a court of equity. The present object is merely to bring to the notice of the reader a brief view of the doctrine of courts of equity in relation to this subject. The jurisdiction of equity in this class of cases has been ably vindicated in the English courts on several occasions, and the doctrine there established has been firmly incorporated into our equity jurisprudence.[5]

In a bill filed by the widow for dower, before Chancellor Kent, the jurisdiction of the court was held to be unquestionable and well established. In that case, with respect to a portion of the premises out of which dower was claimed, it was alleged that the husband was not seised during the coverture. It appeared that on the day of the marriage and before it was solemnized, the intended husband conveyed to his daughter by his former wife, the land in dispute, without consideration and without the knowledge of the intended wife. The husband, notwithstanding, continued in possession for many years, and mortgaged the same to one

[1] 2 R. S. 488. Code of Procedure, § 30.

[2] 2 R. S. 491, § 18.

[3] Ward v. Kilts, 12 Wend. 137. Jackson v. Randall, 5 Cowen, 168. Jackson v. De Witt, 6 id. 316. Same v. Churchill, 7 id. 287. Jackson v. Nixon, 17 J. R. 123.

[4] Hyde v. Hyde, 4 Wend. 630.

[5] Pultney v. Warren, 6 Ves. 89. Strickland v. Strickland, 6 Beav. 77, 80. Curtis v. Curtis, 2 Bro. C. C. 620. Mundy v. Mundy, 2 Ves. jr. 122. Swaim v. Perine, 5 J. Ch. R. 482. Badgley v Bruce, 4 Paige, 98

Dunn, for a valuable consideration. The premises were afterwards redeemed by the daughter. One question was, whether the wife of the grantor was entitled to be endowed, thus treating the deed as fraudulent and void as against her, and another was whether she could be endowed of the equity of redemption.

With respect to the first question, Chancellor Kent held, that a deed thus given by the husband on the eve of his marriage, to his daughter, and without consideration, was fraudulent as against the wife's right of dower.[1] In equity it stands upon the same ground of a similar conveyance by the woman to a stranger, without the knowledge of her intended husband. The husband has an equity that he shall not be deprived by fraud of the rights which the law gives to him over the property of his wife. The rule laid down on this subject is, that if a woman make any conveyance of her own estate before marriage, without the privity of her intended husband, or confess any judgment, or create any incumbrance upon her estate, other than such as are for a valuable consideration, they shall not affect the husband, and a court of equity will, on a bill filed by the husband, set them aside.[2]

A court of law, it has been decided, will not protect the wife in this class of cases. In that court, in an action of dower, the court require that the seisin of the husband should be established, and will not look beyond the actual conveyance made by the husband to see whether it was made to defraud the wife of dower in his estate.[3] Equity looks upon the transaction in a different light, and, when the rights of purchasers and incumbrancers in good faith and for valuable consideration are not involved, holds the fraudulent conveyance as a nullity as to the wife's claim to dower, and would of course set it aside on a proper application; or disregard it when it should be interposed as an obstacle to her recovery. The equity of the husband to his wife's estate is of no higher character than the equity of the wife to her husband's. Both rest upon the same footing.

With regard to the question whether the widow was entitled to dower in an equity of redemption, it has been repeatedly held in this state, in the affirmative, even in cases where she has joined with her husband in the mortgage. But in such a case she is bound to a ratable contribution, as doweress for the redemption of the mortgage.[4] The mode in which

[1] Swaim v. Perine, 5 J. Ch. R. 489. Perine v. Dunn, 3 id. 515.

[2] Clancy on Rights of Women. 614, 615. Howard v. Hooker, 2 Ch. R. 81. Carleton v. Dorset, 2 Vern. 17

[3] Baker v. Chase, 6 Hill, 482.

[4] Swaim v. Perine, 5 J. Ch. R. 491. Van Duyne v. Thayers, 14 Wend. 233; S. C. 19 id. 162. Hawley v. Bradford, 9 Paige 200. Bell v. Mayor of N.Y. 10 id. 49.

this is accomplished, where the heir has redeemed the land by paying off the mortgage, and the widow files her bill against him, for her dower is by paying, during her life, to the heir the one third of the interest on the amount paid by the latter, from the time of such payment, or the value of such annuity, to be computed by the court, or under its direction.[1] The heir who redeems premises subject to dower, is liable to account to the widow for the rents and profits from the death of the husband. She is entitled to one third part of the rents and profits, subject to her ratable contribution towards the redemption of the mortgage.[2]

The general doctrine that equity has concurrent jurisdiction with courts of law, in actions of dower, was sanctioned by Chancellor Walworth in a case before him.[3] He stated the settled rule to be, that upon a bill in equity for the assignment of dower, if the seisin of the husband and the title of the wife be admitted by the answer, to proceed at once to assign dower, and to take an account of the mesne profits since the death of the husband, if it was a case in which the widow would be entitled to damages at law. But if the title of the complainant be denied, the court retained the bill, and directed a suit at law to try the title; and then would give possession to the widow as the right should be established.

Courts of equity can so marshal the assets of the husband as to relieve the real estate to which the wife's dower attaches, of an incumbrance which at law overreaches the dower. Thus, where the husband, for the purpose of depriving his wife of any share of his personal property after his death, purchased real estate from his son at a price far beyond its value, and gave his bond and mortgage for the purchase money, the collection of which was not to be enforced during the life of the husband, though the transaction, it was said, could not be set aside on a bill filed by the widow, because the husband had a legal right to give his personal property to whom he pleased, still, equity would compel the son to apply the personal property, in his hands, applicable to the bond and mortgage, in exoneration of the dower of the widow.[4]

The same principle has been applied in favor of the dower of the widow against the equitable lien of the vendor for the purchase money of real estate, when no security had been taken for the same. The widow takes her dower subject to this equitable lien. But as the unpaid purchase money is the personal debt of the husband, the widow has a right in equity to have the estate of her husband in the hand of his personal representatives, and also that which has descended to his heirs at law,

[1] Swaim v. Perine, 5 J. Ch. R. 493.
[2] Id.
[3] Badgley v. Bruce, 4 Paige, 98.
[4] Holmes v. Holmes, 3 Paige, 363.

first exhausted in a due course of administration, before a resort is had to her dower right in the land for the recovery of the unpaid purchase money. In other words, the assets must be marshaled in favor of the widow's claim of dower.[1]

The circumstance that the premises are at the death of the husband in the hands of a termor, whose term has not expired, afforded, before the Revised Statutes, a just ground to go into equity for relief. As her action could only be brought against the tenant of the freehold, if neither he or the termor would assign her the dower, the remedy at law was difficult and perplexing. And though under the present law an action of ejectment will lie by the widow, in such a case, against the party in possession, for her dower, she can still resort to equity in the first instance, which will afford her a better remedy.[2]

While equity thus affords to the widow, in many cases, a more convenient means than courts of law of obtaining her dower, it enables the heir, on the other hand, to avail himself of defenses which, by the strict rules of the former law, were not available. Thus a collateral satisfaction was not pleadable at law in bar to a freehold right.[3] But in equity the acceptance of a term for years, or of a sum of money, or any other collateral satisfaction, will constitute a good bar.[4] Under the jurisprudence of this state, which allows an equitable defense to be set up to a legal demand, it is presumed at this day, that a collateral satisfaction may be interposed as a defense in an action of ejectment for dower, to the widow's right to recover.[5]

Courts of law as well as courts of equity hold the widow to elect between her dower and a legacy given in lieu of it.[6] The Revised Statutes have provided for barring dower by a jointure, with her assent. Indeed, any pecuniary provision made for the benefit of the intended wife, in lieu of dower, if assented to by her, is a bar to her dower.[7] The doctrine of election, also, which has been elsewhere considered, presents illustrations of the rules by which courts of equity are governed in questions of dower.[8]

If a provision made for the widow in lieu of dower be accepted by her, and fail by reason of the illegality of the instrument by which it was

[1] Warner v. Van Alstyne, 3 Paige, 513, 515.

[2] Badgley v. Bruce, 4 Paige, 100, 101.

[3] Co. Litt. 36 b. Jones v. Powell, 6 J. Ch. R. 200.

[4] Id. Harg. note, 224. Bac. Abr. tit. Dower and Jointure, F.

[5] Giles v. Lyon, 4 Comst. 599. Grant v. Quick, 5 Sandf. S. C. R. 612. Gardner v. Lee, 11 Barb. 558. Bouton v. The City of Brooklyn, 15 id. 375, 384. Hinman v. Judson, 13 id. 629, 631. Hunt v. Farmers' Loan, 8 How. 416.

[6] Van Orden v. Van Orden, 10 J. R. 30.

[7] 1 R. S. 741, §§ 9, 10, 11.

[8] Ante, p. 544 et seq.

created, she is not bound in equity by that election, except as against bona fide purchasers and mortgagees; but may claim her dower.[1]

There may be cases where a just equivalent in money is better for all parties than a recovery of the dower in an action at law. Suppose the husband was a tenant in common with divers other persons, and that the premises have passed into the hands of different purchasers, who have not paid the purchase money: a court of law could only adjudge to the widow a third part of the land itself. But equity could leave the purchaser undisturbed, and with the assent of the widow, decree her a compensation in lieu of dower.[2]

The foregoing cases are enough to illustrate the equity jurisdiction in questions of dower, both where the widow claims relief, and where relief is sought against her. The subject in its other aspects belongs to treatises on law rather than equity. The occasions for the interposition of equity are of less frequent occurrence here than in England, and are less necessary now than formerly.

SECTION II.

OF PARTITION.

AT common law, estates with respect to the connection of their owners, when held by more than one person, were divided into estates in joint tenancy, in common, and coparcenary. The two first were created by the act of the parties, and the last by the act of the law. Though at common law partition could be made in every case, by the consent of all the owners, yet it could not be compelled, by one co-tenant against the will of the others, or of any of them, except in the case of coparceners, until the statute of 31 Henry 8, ch. 1, and 32 Henry 8, ch 32,[3] extended the writ of partition to joint tenants and tenants in common.

Under the colonial government there were several acts relative to partition, passed at different times; but at the close of the revolution and in 1788 the above mentioned English statutes were re-enacted.[4] These statutes put the right to compel partition between tenants in common and joint

[1] Hone v Van Schaick, 7 Paige, 221, 233.

[2] Herbert v. Wren, 7 Cranch, 370.

[3] Co. Litt. 187. Bac. Abr. tit. Joint Tenants, I, No. 7.

[4] 2 Greenl. 13.

tenants upon the same footing as coparceners. The common law learning in partition, in respect to parceners, is displayed at large by Lord Coke. It is replete with subtle distinctions and antiquated erudition.[1] The ancient common law remedy was simplified by statute.

In this state, under our law of descents the estate of coparcenary no longer exists. On the death of the ancestor intestate, the persons who take by descent, whether male or female, take as tenants in common, in proportion to their respective rights.[2] It is therefore only in very remote cases, which can scarcely ever arise, that the rules of the common law doctrine of descent can apply. It is presumed that in most if not in all the states, where more persons than one take by descent, they take as tenants in common, so that the former distinctions between estates in coparcenary and in common no longer exist.

The old real actions having been all abolished, the legislature provided, in the Revised Statutes, a convenient mode of making partition between joint tenants and tenants in common, by petition to the supreme court, or the court of common pleas of the county where the lands are situated, and now the county court.[3] The statute also, in terms, gives to the court of chancery the same power, upon petition, or bill filed in that court, to decree partition and sales of lands, tenements and hereditaments, as is therein given tothe common law courts in like cases ;[4] and in a subsequent section enacts, that whenever partition shall be decreed by a court of equity, if it shall appear that it cannot be made equal between the parties, without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case.[5]

The jurisdiction of courts of equity in matters of partition existed anterior to the Revised Statutes, and independently of any statute regulation on the subject. But it was intended by the legislature that subsequent to the adoption of the Revised Statutes the proceedings should be conformed to the statute.[6]

A court of equity, as was remarked by the learned judge in a recent case,[7] administers its relief according to its own notions of general justice and equity between the parties. It will adjust by its decree, all the equitable rights of the parties interested in the premises. It is not re-

[1] Co. Litt. tit. Parceners, 163–175.
[2] 1 R. S. 753.
[3] 2 R. S. 317 et seq.
[4] Id. 329, § 79.
[5] 2 R. S. 330, § 83.
[6] Larkin v. Munn, 2 Paige, 27. Herbert v. Wren, 7 Cranch, 370. Jackson v. Edwards, 7 Paige, 386.
[7] Paige, J. in Green v. Putnam, 1 Barb. S. C. R. 509. Haywood v. Judson, 4 id. 229.

strained as a court of law is, to a mere partition of the lands between the parties, according to their interests in the same, and having a regard to the true value thereof. But it may, with a view to a more perfect partition of the premises, decree a pecuniary compensation to one of the parties, for equality of partition, so as to prevent any injustice or unavoidable inequality. So a court of equity will assign to the parties respectively, such parts of the estate as will best accommodate them, and be of the most value to them, with reference to their respective situations in relation to the property before the partition.

It is upon these principles that when a tenant in common lays out money in improvements on the estate, although the money so expended does not, in strictness, constitute a lien upon the estate, yet a court of equity will not grant a partition, without first directing an account and a suitable compensation; or else, in the partition it will assign to such tenant in common, that part of the premises on which the improvements have been made.[1] To entitle the tenant in common to this allowance, it is not necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements, and a refusal.[2]

It was on the same principle that where an idiot had pulled down a school house on a lot owned by him and the trustees of the district in common, the court held that an equitable partition should be so made, that the trustees might be allowed for their damages in the share set off to them.[3]

So where five of six children, the sixth being an idiot, made an arrangement by which they conveyed one half of the premises owned in common, to A., being one of them, and the other half to B. another heir, upon B.'s agreement to support the idiot, whose share B. was to have, it was held that a purchaser from A., who supposed he was acquiring title to the half set off to him, was equitably entitled, on a partition, to have the idiot's share set off on the half conveyed to B.[4]

In this case, a court of law could not afford any relief suitable to the equity of the case. No title to the idiot's share of the property could pass by the agreement, and the agreement to support the idiot was without consideration and void. The only effectual remedy, in both cases, could be found in an equitable partition of the property, and this was

[1] Town v. Needham, 3 Paige, 546. Green v. Putnam, 1 Barb. S. C. R. 507.
[2] Id
[3] Matter of Hiller, 3 Paige, 199.
[4] Teal v. Woodworth, 3 Paige, 470.

accordingly granted by a court of equity. The court derived its power in this respect, not from the statute relative to the partition of lands, but from its ordinary jurisdiction over the subject of partition.

According to the English practice, the parties on a decree of partition execute mutual releases to each other, to be settled by a master, and such was the practice here, before the statute of 1813.[1] Under that statute it was held by Chancellor Kent that mutual releases were unnecessary, but the partition became complete by the final decree of the court confirming the partition as made by the commissioners.[2] A *feme covert* cannot be bound by a decree against her husband in a partition suit to which she is not a party. It is proper, therefore, in all cases where a sale of the premises will probably be necessary, that the wife should be joined with the husband as a party in the suit, so that the purchaser's interest in the premises may not be charged with the incumbrance of her contingent claim of dower. But when an actual partition of the premises can be made, it is not material that the wife, who has only an inchoate right of dower in her husband's undivided interest therein, should be made a party; as her dower will attach upon that part of the premises which shall be set off to him in severalty.[3]

Although the Revised Statutes have given specific directions as to the mode of ascertaining and securing the shares of the proceeds belonging to the tenants in dower and by the curtesy, and other tenants for life having present estates in possession in the premises,[4] there is still a large class of future estates, both vested and contingent, that are not embraced in those specific directions. It has been made a question whether such contingent interest can be sold under a decree, in cases where the commissioners have reported that a sale is necessary to secure the interests of the respective parties. The act of 1813 did not provide even for making a widow a party who had a present right of dower in the premises, although that dower still remained unassigned; nor did it contain a provision for creditors, who had liens upon some of the shares of the tenants in common, to be made parties to the proceedings, nor for the payment of their debts out of the proceeds of the shares on which such debts were a lien. The Revised Statutes provide for both these defects.[5] The chancellor, however, thought, on a careful examination of the several provisions of the Revised Statutes relative to the partition of lands, in

[1] 1 R. L. 514, § 17. Young v. Cooper, 3 J. Ch. R. 296. Jackson v. Edwards, 7 Paige, 404.

[2] Young v. Cooper, supra.

[3] Wilkinson v. Parish, 3 Paige, 658.

[4] 2 R. S. 325, §§ 50, 51.

[5] Id. and §§ 44, 45.

connection with the former legislation on the subject, that a sale by the commissioners in partition, under the judgment of a court of law, or by a master in chancery under a decree of that court, would of itself be sufficient, without any act of the wife, to bar or extinguish her contingent right or interest to dower in the share of her husband, when she is made a party to the suit, whether she is an infant or adult.[1] Although some doubt was suggested by Bronson, J., on this point, when the same cause was in the court of errors, yet as the decree was affirmed, and no dissent from the views of the chancellor was expressed by the court of errors, and they were expressly approved by the only senator who delivered an opinion, it is believed that the doctrine of the chancellor is sound,[2] and must be regarded as the law.

It was no doubt the intention of the legislature, that the purchaser under the judgment or decree, where a sale of the premises is found to be necessary, should acquire a perfect title as against every future or contingent interest in any undivided share of the property. Without the power to convey such title, it would be difficult for the court to make the partition equal in the case of a sale; as a contingent right of dower or other defect in the title as to one share in the property, must, upon a sale, necessarily diminish the amount bid for all of the shares collectively. But to enable the court to direct a sale cutting off the inchoate right of dower of the wife, she should be a party to the suit, and the value of her interest should be computed and secured for her benefit. The proper rule, says the chancellor, for computing this interest, during the life of the husband, is to ascertain the present value of an annuity for her life equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband; and the difference between those two sums will be the present value of her contingent right of dower.[3]

If the title be defective at the time of the sale, under a decree in partition, the defect must be removed, within a reasonable time, so that the purchaser will have the substantial benefit of his bargain, or equity will not compel him to take the perfected title.[4]

In general a partition should be decreed rather than a sale. The latter course is authorized only in cases where an actual partition cannot be made without *great prejudice* to the owners.[5] If, therefore, a sale would

[1] Jackson v. Edwards, 7 Paige, 406.
[2] S. C. in Error, 22 Wend. 498, 512, 517.
[3] Jackson v. Edwards, 7 Paige, 408.
[4] Id. 386.
[5] 2 R. S. 330, § 81.

be equally prejudicial, an actual partition should be made.[1] If the aggregate amount of benefits to the parties from a sale instead of a partition, will be small, in reference to the value of the property, there can be no reason to depart from the ordinary decree of partition.[2]

Property may be so situated that a partition cannot be conveniently made, without charging upon the portion assigned to one party, a servitude or easement in favor of another. A court of equity has power to make partition upon that principle.[3] This will most frequently occur in the partition of mills and water rights. The principle was fully exemplified in Smith v. Smith, already cited.

Where in an action for partition the legal title is disputed and doubtful, the course is to send the parties to a court of law, to have the title established.[4] Where the premises are held adversely, the bill should be dismissed without prejudice to a new suit after the complainant shall have obtained possession, by suit at law. Where there is no dispute about title, partition is a matter of right.[5]

We have hitherto treated of the partition of estates where the titles are *legal*. In such a case courts of equity submit the legal questions, if the title be controverted, to the determination of a court of law, retaining the bill, for further action, after the title shall have been established. But if the title be equitable, the court of equity decides the whole matter without the intervention of a court of law; for equitable titles belong peculiarly to courts of equity to decide.[6] Thus, the owners of an equity of redemption may have partition among themselves, without affecting the rights of the mortgagees.[7] And a defendant in partition may set up in his answer, as a defense to the suit, an equitable title in himself to the whole premises.[8]

A court of equity may, if the justice of the case require it, set off to one co-tenant the share belonging to him, and decree a sale of the residue for the benefit of the other tenants, providing for compensation in case of inequality of partition.[9] And partition may be decreed assigning to the complainant the portion to which he is entitled, and the remainder to the defendants, aggregately; thus leaving them afterwards to divide the

[1] Smith v. Smith, 10 Paige, 470.

[2] Smith v. Smith, supra. Classon v. Classon, 6 Paige, 541. Reynolds v. Reynolds, 5 id. 161. Van Arsdale v. Drake, 2 Barb. S. C. R. 599.

[3] Id. Warren v. Baynes, Ambl. 589. Lister v. Lister, 3 Y. & Col. 540. Hill v. Dey, 14 Wend. 204.

[4] Coxe v. Smith, 4 J. Ch. R. 271.

[5] Smith v. Smith, 10 Paige, 470. Haywood v. Judson, 4 Barb. 229.

[6] Coxe v. Smith, 4 J. Ch. R. 271. Hosford v. Merwin, 5 Barb. 52.

[7] Wotten v. Copeland, 7 J. Ch. R. 140. Sebring v. Messereau, Hopk. Ch. R. 502, 503.

[8] German v. Matchin, 6 Paige, 288.

[9] Haywood v. Judson, 4 Barb. 228.

share allotted to them when it shall be convenient.[1] In the case cited, the right of the complainant to a moiety was conceded by the defendants, but they differed among themselves as to the share to which they were respectively entitled in the other moiety. Some of them claimed the whole of it, and others distinct portions of it. The court having thus set off to the plaintiff the share allotted to him, retained the bill, to enable the defendants to settle their respective titles as amongst themselves at law, and leaving the question of partition as to them to be determined on a future application.

In equity there is no necessity that a partition should be so made as to give each party a share in every part of the property. If each party has his share in value, it is sufficient; and if the land allotted to one exceeds in value that allotted to another, the court can compel the former to make compensation to the latter, for equality of partition.[2]

[1] Phelps v. Green, 3 J. Ch. R. 302. Brookfield v. Williams, 1 Green's Ch. R. 341. Earl of Clarendon v. Hornby, 1 P. Wms. 446.

CHAPTER X.

OF PARTNERSHIP.

THE necessity of taking an *account* on the final adjustment of copartnership dealings, and the complicated nature of the remedy at common law, in all cases, and the total inefficiency of it in many, have led, as has been already stated, to the remedial interference of courts of equity. Whether the copartnership be dissolved by mutual consent or by efflux of time, or whether it be terminated by the death or insolvency of one or more of the partners, a court of equity affords the most perfect means of winding up its affairs, and of settling the various equities which may exist. From these causes, the jurisdiction of courts of equity in matters of copartnership has often been referred to their jurisdiction over matters of account.

As partners are joint tenants of the stock and effects of the concern, the rights and remedies of the firm, by the strict rules of the common law, on the death of one go to the survivor;[1] and this whether the joint tenancy be of goods and chattels in possession or in right, or of joint tenants of a freehold.[2] An exception was made, at an early day, in favor of merchants, which has been extended to traders generally, and which in truth, at this day, embraces all copartnership transactions. The remedy at law still survives, but the right and the remedy in equity, vests in the representatives of the deceased copartner.[3] The custom or law of merchants, excluding survivorship, extends to all traders; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet.*[4] In Allen v. Blanchard, the principle was applied to a copartnership in the practice of physic, which was held to be within the rule excluding survivorship.

These principles give rise to another source of equitable jurisdiction. A surviving partner, though he has the legal right to the partnership

[1] Co. Litt. 182 a.
[2] Id.
[3] Allen v. Blanchard, 9 Cowen, 631. Jeffreys v. Small, 1 Vern. 217. Co. Litt. 182.
[4] Co. Litt. 182 a. Allen v. Blanchard, supra.

effects, yet in equity is considered merely as the trustee to pay the partnership debts, and dispose of the effects of the concern for the benefit of himself and the estate of his deceased partner.[1] On the same principle the effects of a copartnership, on the insolvency of the firm, are in equity considered as a trust fund for the payment of the partnership debts, ratably; and they will be so applied upon the application of either of the partners.[2] Hence the unquestioned jurisdiction of equity over trusts affords an ample field for the exercise of jurisdiction, as well over the individual partners as over the effects of the copartnership, in cases of death or insolvency. And this jurisdiction can be exerted either on the application of a copartner, or the representatives of the deceased copartner, or the creditors of the firm, or of an individual member of the firm. For though the creditors of one of the partners has no lien upon the property and effects of the copartnership, yet a court of equity will aid the creditor of an individual partner, by a quasi substitution, and thus enable him to acquire his demand through the equities of the partners as between themselves, or their representatives.[3]

But whether the jurisdiction of courts of equity over partnership matters be referable to their general jurisdiction over accounts, or over trusts, is perhaps of no moment, especially in this state, under our existing system of jurisprudence. The jurisdiction itself is firmly established, and of the most benignant character.

In considering the cases which properly fall within the cognizance of courts of equity, it is first necessary to determine what constitutes a partnership between the parties themselves. This is defined by an elementary writer of high reputation on the subject of partnership, thus: Partnership between the parties themselves is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business or adventure.[4] This definition has been substantially sanctioned by courts of law and equity in this state. To constitute a partnership as between the parties themselves, there must, says Chancellor Walworth, be a joint ownership of the partnership funds, according to the intention of the parties; and an agreement, either express or implied, to participate in the profits and losses of the business,

[1] Case v. Abeel, 1 Paige, 393.

[2] Egberts v. Wood, 3 Paige, 517. Innes v. Lansing, 7 id. 583. Whiteright v. Stimpson, 2 Barb. S. C. R. 379.

[3] Ketchum v. Durkee, 1 Barb. Ch. R. 480.

[4] Collyer on Partnership, 2. Pattison v Blanchard, 1 Seld. 189.

either ratably or in some other proportion to be fixed upon by the copartners.[1] A partnership, says Woodworth, J., is a joint undertaking to share in the profit and loss.[2] A partnership, says Sutherland, J., is nothing more than a community of interest between two or more persons, and a sharing of profit and loss, either in relation to a general trade or a specific adventure. To constitute a partnership in a particular purchase as in a single concern, there must either be a joint undertaking to pay, or an agreement to share in the profit and loss.[3] It is a clear proposisition, that he who is to take a part of the profits indefinitely, shall, by operation of law, be made liable to losses; upon the principle that by taking part of the profits he takes from the creditors a part of that fund which is the security for the payment of their debts.[4] This right to share in the profits as such; such as would for that reason alone entitle him to an account in equity against the other persons concerned in the business, seems essential to constitute a partnership as between themselves.[5]

Where two persons agreed to burn lime on shares, one to fill a kiln with stone, and the other to burn the kiln and furnish the necessary wood for the purpose, the lime to be equally divided between them, it was held that a technical partnership existed between the parties.[6]

But an agreement by one to work another's farm on shares, does not make them partners. Such parties are merely tenants in common of the crops.[7] So a person who is employed in the business of another, and is to be compensated by a salary, and a share of the profits, and who is not also liable for losses, is not a partner.[8] So an agent or servant who is to obey orders, and has no interest in the capital stock, is not a partner even as to third persons, merely because he is to receive a share of the profits of the business as a compensation for his services.[9] Though it be true, as a general rule, that a communion of profits will make men partners, and draw after it a liability for losses, yet it is well settled that the rule is not universal. And it was said by Bronson, J., in the last mentioned

[1] Chase v. Barrett, 4 Paige, 160.

[2] Reynolds v. Cleveland, 4 Cowen, 288.

[3] Cumpston v. McNair, 1 Wend. 463. Post v. Kimberly, 9 J. R. 495, 496, per Spencer, J. Porter v. McClure, 15 Wend. 193, per Bronson, J.

[4] Doe v. Halsey, 16 J.R 40. Chase v. Barrett, 4 Paige, 159.

[5] Heimstreet v. Howland. 5 Denio. 68. Champion v. Bostwick, 18 Wend. 175. Pattison v. Blanchard, 1 Seld. 186–189.

[6] Musier v. Trumpbour, 5 Wend. 274.

[7] Putnam v. Wise, 1 Hill, 275.

[8] Vandenburgh v. Hull, 20 Wend. 70 See remarks of Ch. Walworth, in Champion v. Bostwick, 18 id. 184, 185.

[9] Id. Burckle v. Eckart, 1 Denio, 337; affirmed 3 Comst. 132.

case, and approved by the court of appeals, in the same case, that the exception which will best reconcile the cases, and which is the least liable to abuse, and which is so distinctly marked that it can be easily administered, is that which allows one man to employ another as a subordinate in his business, and agree to pay him out of profits, if any shall arise, without giving the party employed the rights, or subjecting him to the liabilities of a partner.[1]

The definition of a partnership, as already given, would seem to limit the subject matter of a partnership to money, goods, labor and skill, employed for a communion of profit, in a legal trade, business or adventure. But a partnership may exist in real estate, and in ships, notwithstanding the title to such property is usually held in common. Thus, though part owners of a vessel are in general tenants in common, and not joint tenants, yet it has been held in this state, that the owners of a ship may hold her in partnership, and may be interested as such, in her voyages and cargoes, or in a particular voyage.[2]

At law, the general rule was formerly stated to be that where real estate was held by partners for the purposes of the partnership, they did not hold it as partners, but as tenants in common, and the rules relative to partnership property did not apply in regard to it.[3]

Where real estate is conveyed to copartners, in their individual names, for the use and benefit of the firm, or is so conveyed to them in payment of debts due to the partnership, the legal title vests in the grantees thereof, as in ordinary conveyances of real estate. And, by the common law, where land was purchased with copartnership funds, for copartnership purposes, and was conveyed to all the partners generally, in fee, it would at law create a joint tenancy; so that neither could convey any more than his share of the land during the lives of his copartners. And upon the death of either of the copartners, without having severed the joint tenancy by a conveyance, the legal title to the whole of the land would survive to the other copartners. But under the statutes of New-York relative to joint tenancies, the several copartners to whom such a conveyance is made, become tenants in common of the legal title. And upon the death of either, the undivided portion of the legal title, thus vested in the deceased partner, descends to his heirs at law; without ref-

[1] Burckle v. Eckart, 1 Denio, 337; affirmed, 3 Comst. 132. Dodington v. Hallet, 1 Ves. sen. 497 Smith v. De Silva, Cowp. 469.

[2] Mumford v. Nicoll, 20 J. R. 611, 632, 635; reversing S. C. 4 J. Ch. R. 522.

[3] Coles v. Coles, 15 J. R. 159.

erence to the equitable rights of the several partners, in the land, as a part of the property of the firm.[1]

It is quite obvious that a court of law cannot, upon mere common law principles, administer complete justice in cases of this kind. But a court of equity views the transaction in a different light. Where real estate is purchased with partnership funds for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or of any of the members thereof as individuals, it has never been doubted in England, that such real estate was, in equity, to be considered and treated as the property of the members of the firm collectively; and as liable to all the equitable rights of the partners as between themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those who are beneficially interested in the fund; not only during the existence of the copartnership, but also upon the dissolution thereof by the death of some of the copartners or otherwise. And the same rule now prevails in this state.[2]

The decisions in England are conflicting on the question, whether real estate of a copartnership, upon the death of one of the copartners, and after the debts have been paid, and the equities adjusted between the several members of the firm, belongs in equity, to the executor or administrator of the deceased, as a part of his personal property; or whether the beneficial interest, as well as the legal title of the deceased in the share of such real estate, descends to the heir at law. Lord Thurlow, on one occasion, inclined to think the interest of the deceased partner must, in equity, be considered as a part of his personal property; and that it should go to his personal representatives.[3] But upon a second argument of the same case he changed his opinion, and decided that in the absence of any agreement that the land should be converted into personalty at the termination of the partnership, it belonged to the heir, as real estate. That decision was followed by Sir William Grant in two cases,[4] both of which decisions were overruled by Lord Eldon.[5] It is believed to be the general rule in England, at this time, that real estate belonging to the

[1] Buchan v. Sumner, 2 Barb. Ch. R. 166. 1 R. S. 727, § 44.

[2] Buchan v. Sumner, 2 Barb. Ch. R. 198. Smith v. Tarlton, id. 336. Lake v. Cradock, 3 P. Wms. 158. Elliot v. Brown, 9 Ves. 597. Smith v. Smith, 5 id. 189. Delmonico v. Guillaume, 2 Sandf. Ch. R. 366. Feriday v. Wightwick, 1 R. & Myl. 45. Philips v. Philips, 1 Myl. & K. 649. Broom v. Broom, 3 id. 443. Cookson v. Cookson, 8 Sim. 529. Townsend v. Devaynes, 11 id. 498, note.

[3] Thornton v. Dixon, 3 Bro. Ch. C. 199.

[4] Bell v. Phyn, 7 Ves. 457. Balmain v. Shore, 9 id. 500.

[5] Townsend v. De Vaynes, Montagu on Partn. app. 97.

firm, unless there is something in the partnership articles to give it a contrary direction, is to be considered, in equity, as personal property; and that it goes to the personal representatives of the deceased partner who was beneficially interested therein.[1]

The American decisions on this subject are various and conflicting. They are reviewed by the chancellor in Buchan v. Sumner, (supra,) and he thinks that they may be said to establish two principles: First, that real estate purchased with partnership funds and for the use of the firm, is in equity chargeable with the debts of the copartnership, and with any balance which may be due from one copartner to another, upon the winding up of the affairs of the firm: Secondly, that as between the personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the copartnership which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate.[2]

Although a court of equity in this state considers and treats real property as a part of the stock of the firm, it leaves the legal title undisturbed, except so far as is necessary to protect the equitable rights of the several members of the firm therein. The separate creditors of the individual partners have no equitable right to any part of the partnership property until the debts of the firm are provided for, and the rights of the partners, as between themselves, fully protected.[3]

[1] Buchan v. Sumner, 2 Barb. Ch. R. 199, 200. Selkrigg v. Davies, 2 Dow. P. C. 231. Philips v. Philips, 1 Myl. & K. 649. Broom v. Broom, 3 id. 443. Houghton v. Houghton, 11 Sim. 495. Morris v. Kearsly, 2 Y. & Col. 139. Rowley v. Adams, 7 Beav. 548.

[2] Smith v. Jones, 3 Fairf. 337. Blake v. Nutter, 1 Appl. R. 19. Duldey v. Littlefield, 8 Shep. R. 422. Pitts v. Waugh, 4 Mass. R. 424. Goodwin v. Richardson, 11 id. 469. Hoxie v. Carr, 1 Sumn. R. 104. Sigourney v. Munn, 7 Conn. 11. Smith v. Jackson, 2 Edw. Ch. R. 28. Smith v. Wood, Saxt. R. 76. Baldwin v. Johnson, id. 441. McDermot v. Lawrence, 7 Serg. & R. 438. Hale v. Henrie, 2 Watts, 144. Forde v. Herron, 4 Munf. 316. Deloney v. Hutchinson, 2 Rand. 183. Edgar v. Donnelly, 2 Munf. 387. Baird v. Baird, 1 D. & Bat. Eq. Cas. 524. Richardson v. Wyatt, 2 Desauss. Eq. R. 471. Winslow v. Chiffelle, Harp. Eq. R. 25. McAlister v. Montgomery, 3 Hay. R. 94. Hunt v. Benson, 2 Humph. 459. Green v. Surviving Partners of Green, 1 Ham. Ohio R. 535. Green v. Graham, 5 id. 264. Pugh v. Currie, 5 Ala. N. S. 446. Woolridge v. Wilkin, 3 How. Miss. R. 360. Thayer v. Lane, Walk. Ch. R. 200. Coles v. Coles, 15 J. R. 159. Cox v. McBurney, 2 Sandf. Ch. R. 561. Averill v. Loucks, 6 Barb. 19. Dyer v. Clark, 5 Metc. 562. Burnside v. Merrick, 4 id. 537.

[3] Buchan v. Sumner, 2 Barb. Ch. R. 207. Nicholl v. Mumford, 4 J. Ch. R. 522. Christian v. Ellis, 1 Gratt. 396. Cammack v. Johnson, 1 Green's Ch. R. 163. Pierce v. Tierman, 10 Gill & J. 253.

The foregoing observations are sufficient to show what constitutes a partnership as between the parties themselves, and the general nature of the subject of such partnership, together with some of its incidents. Such partnership gives them a right of action in their character of partners as against third persons, and enables any one of them to file his bill in equity against the others for a dissolution of the partnership, a sale of the copartnership effects, and a division of the proceeds among the partners.[1]

Persons become liable to third persons as partners, either by contracting the legal relation of partnership *inter se*, or by holding themselves out to the world as partners. And the general rule is, except in limited partnerships formed in pursuance of the statute, that not only all the partners are liable for the debts of the firm to the extent of their interest in the joint stock, but also to the whole extent of their separate property.[2]

The statutes of New-York have provided for a partnership with a restricted responsibility. The act was first passed in 1822, and was revised in 1830;[3] and it provides for the formation of limited partnerships for the transaction of any mercantile, mechanical or manufacturing business, within this state, but not for the purpose of banking, or making insurance. Such partnership consists of two or more persons, one or more of whom are called general partners, and are jointly and severally responsible as general partners now are by law; and one or more persons who shall contribute, in actual cash payment, a specific sum as capital, to the common stock, who are called *special partners*, and who are not liable for the debts of the partnership, beyond the fund contributed by him or them to the capital. The general partners only are authorized to transact business and sign for the partnership, and to bind the same. For the purpose of forming such a partnership, the parties are required severally to sign a certificate, stating the name or firm under which such partnership is to be conducted; the general nature of the business intended to be transacted; the names of all the general and special partners interested, distinguishing which are general and which special partners, and their respective places of residence; the amount of capital which each special partner shall have contributed to the common stock; the period at which the partnership is to commence, and terminate.[4] This certifi-

[1] Collyer on Part. 3.

[2] Ex parte Langdale, 18 Ves. 301. Carlen v. Drury, 1 Ves. & B. 157. Waugh v. Carver, 2 H. Bl. 235. Hesketh v. Blanchard, 4 East, 144. Madison County v. Gould, 5 Hill, 311.

[3] L. of 1822, ch. 244, p. 259. 1 R. S. 763.

[4] 1 R. S. 764, § 4.

cate is to be duly acknowledged before a proper officer and filed in the office of the clerk of the county in which the principal place of business of the partnership is situated, and also recorded at full length, and kept open for public inspection. If the partnership has places of business in other counties, a transcript of the certificate and acknowledgment must be filed and recorded in like manner in the office of the clerk of such county or counties. At the same time, an affidavit of one or more of the general partners must also be filed in the same office with the original certificate, stating that the sums specified in the certificate, to have been contributed by each of the special partners to the common stock, have been actually and in good faith paid in cash. If any false statement is made in the certificate or affidavit, all the persons interested in such partnership, are made liable for all the engagements thereof, as general partners.

The terms of the partnership, when registered, must be published by the partners for six weeks immediately after the registry. In like manner, every renewal or continuance of such partnership, beyond the time originally fixed for its duration, must be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given, in the manner required for its original formation; and every such partnership which shall be otherwise renewed is declared to be a general partnership.

Every alteration made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificates, is deemed a dissolution of the partnership. And every such partnership in any manner carried on after any such alteration is deemed a general partnership, unless renewed as a special partnership, according to the provisions of the act.

With regard to the manner in which the business is to be carried on, and the persons by whom it is to be conducted, it is provided that it must be in the *name* of the general partners, and by them, without the addition of "company," or any other general term. If the name of a special partner is used in the firm, with his privity, he is deemed a general partner.

The statute, however, permits the special partner, from time to time to examine into the state and progress of the partnership concerns, and to advise in their management; but he is not allowed to transact any business on account of the partnership, or to be employed for that purpose as agent, attorney or otherwise. By his interference in the matter, contrary to the provisions of the act, he becomes a general partner.

Though the special partner is not allowed to withdraw any portion of the capital contributed by him, at any time during the continuance of the

partnership, he is nevertheless permitted annually to receive lawful interest on the sum so contributed by him, if the payment thereof does not reduce the original amount of such capital; and if after the payment of such interest, any profits remain to be divided, he may also receive his portion of such profits.[1]

The partnership is forbidden to make assignments or transfers, or create any lien with the intent to give preference to creditors. And in case of the insolvency or bankruptcy of the partnership, no special partner is allowed, under any circumstances, to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied.

Suits in relation to the business of the partnership are brought and conducted, by and against the general partners, in the same manner as if there were no special partners.[2] This provision it is presumed is still in force, notwithstanding the code, which as a general rule requires the action to be prosecuted in the name of the real party in interest. It falls within the exception.[3]

If the parties desire to dissolve the partnership, before the time admitted for that purpose in the certificate of its formation, they must cause a notice of such dissolution to be published for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business, and in the state paper. But such notice is not necessary to be given, when the partnership expires by the limitation of the original certificate.[4]

To enable a special partner to escape from the liability of a general partner, he must see that the provisions of the law have been strictly complied with, and that he has not violated any of the requirements of the law, in meddling with the concerns of the partnership.[5]

It would seem that the general partners cannot, in case of insolvency, make an assignment of all the partnership effects to a trustee for the payment of the partnership debts ratably or otherwise; unless provision is made for such assignment in the articles of copartnership.[6] The implied authority arising from the ordinary contract of copartnership, does not authorize one of the partners, without the assent of his copartners, to make a general assignment of the copartnership effects to a trustee for the benefit of creditors, and giving preferences to one class of creditors over another.[7] The special partners, it would seem, should unite in the

[1] 1 R. S. 764, § 15.
[2] Id. § 14.
[3] Code, §§ 111, 113.
[4] Haggerty v. Taylor, 10 Paige, 262.
[5] Madison Co. Bank v. Gould, 5 Hill, 309. Smith v. Argall, 6 id. 479; affirmed 3 Denio, 435. Brown v. Argall, 24 Wend. 496.
[6] Mills v. Argall, 6 Paige, 582.
[7] Havens v. Hussey, 5 Paige, 31.

general assignment to make it effectual, where no provision has been made for it in the articles.

The business of the firm is conducted by the general partners alone, and they or any one of them may, during the continuance of the partnership. transfer so much of the partnership effects in the name of the firm, as may be sufficient for that purpose, to one or more creditors of the firm, in payment of their debts. The principle upon which such assignment is upheld is, that there is an implied authority for that purpose, from the copartners, from the very nature of the copartnership; the payment of the company debts being always a part of the necessary business of the firm. But it is no part of the ordinary business of a copartnership, to appoint a trustee of all the partnership effects, for the purpose of selling and distributing the proceeds among the creditors in unequal proportions.[1]

The statute evidently treats the property of a limited partnership, after insolvency, as a trust fund, for the benefit of all the creditors; and if the partners neglect to place it in the hands of a proper and responsible trustee, to be distributed without delay among the creditors, other than the special partners, any creditor may proceed at once in equity, for the appointment of a receiver and a distribution of the fund.[2]

Though an agreement in writing be necessary to constitute a special partnership, according to the statute, and a strict conformity to the provisions of the act be necessary, in order to restrict the responsibility of the special partners to the extent of their funds put into the concern, yet a copartnership may be formed between parties, by parol, and without any written contract, when the copartnership is to take effect immediately.[3] The mere consent of the parties, evidenced by their acts or words, is all that is required for this purpose. If, however, an agreement be made to enter into a partnership, at a future day, after the expiration of a year, it has been doubted whether the agreement could be enforced unless it was reduced to writing and subscribed by the parties.[4] And it is no objection to the formation of the partnership, by parol, that one of the declared objects of the copartnership is to purchase real estate for the purposes of the firm, and as a site for the transaction of its business. Such real estate, purchased with partnership funds for the use of the

[1] Havens v. Hussey, 5 Paige, 31. Egbert v. Wood, 3 id. 517. Harrison v. Sterry, 5 Cranch, 300.

[2] Innes v. Lansing, 7 Paige, 583. Whitewright v. Stimpson, 2 Barb. S. C. R. 379.

[3] Smith v. Tarlton, 2 Barb. Ch. R. 336. Featherstonhaugh v. Fenwick, 17 Ves. 298.

[4] Smith v. Tarlton, supra. 2 R. S. 135, § 2.

firm, in whose name the conveyance is taken, is in equity considered the property of the firm for the payment of its debts, and for the purpose of adjusting the equitable claims of the copartners between themselves.[1]

Though it is not the object of this chapter to treat of the subject of partnership at large, but merely to notice some of the cases in which the interference of equity is indispensable for complete justice, yet it is proper to add that the acts of a majority of the partners bind the rest.[2] In general one partner cannot bind his copartners by seal, without special authority for that purpose, and the authority may be by parol.[3] This rule applies only to cases where an obligation is sought to be created; but one partner may, in the name of the firm, make a valid release under seal, of a debt due to the partnership.[4] This is upon the principle that each partner has a right to receive the debt, and of course his individual receipt, or release, would be evidence of such payment. The release of one joint obligee bars his companion.[5]

Partners may bind themselves by a private agreement concerning the partnership business.[6] But an agreement between them that neither shall make a contract to charge the others, will not affect strangers having no notice of it.[7]

It is mainly after the dissolution or insolvency of a partnership that the interference of a court of equity becomes necessary to settle and adjust the equities of the partners amongst themselves, as well as the equities of creditors of individual partners, to the share of their debtor in the copartnership effects.

The partnership may be dissolved in a variety of ways. It may expire by its own limitation. It may be dissolved by the act of either partner, without previous notice, where the partnership is formed without written articles, restraining the party from this exercise of his authority.[8] It may be dissolved by the death, insanity or bankruptcy of one or more of the partners;[9] by the breaking out of war between two countries, when the members of the firm thus become subjects of hostile govern-

[1] Smith v. Tarlton, supra.

[2] Kirk v. Hodgson, 3 J. Ch. 200. Wilkins v. Pearce, 5 Denio, 541.

[3] Green v. Beals, 2 Cai. 254. Clement v. Brush, 3 J. C. 180. Skinner v. Dayton, 5 J. Ch. R. 351; S. C. 19 J. R. 513.

[4] Pierson v. Hooker, 3 J. R. 68. Bulkley v. Dayton, 14 J. R. 387.

[5] Ruddock's case, 6 Co. 25. Buren v. Marquand, 17 J. R. 58.

[6] Gould v. Banks, 8 Wend. 562.

[7] Tradesman's Bank v. Astor, 11 Wend. 87.

[8] Featherstonhaugh v. Fenwick, 17 Ves. 298.

[9] Griswold v. Waddington, 15 J. R. 57; S. C. affirm. in error, 16 id. 438.

ments,[1] and by the conviction of one of the partners of a capital offense.[2] It has been held that the marriage of a *feme sole* partner is a dissolution of a partnership at will.[3] So also a bona fide assignment by one of several partners, of all his interest in the copartnership stock, *ipso facto*, dissolves the copartnership, though one of the articles expressly provides that the copartnership is to continue until two of the contracting parties should demand a dissolution, and the other partners were desirous to have it continue, notwithstanding the assignment.[4] Such assignment operates as a severance of the interest of the partners. A partner cannot, without the consent of his copartners, introduce a third person as a partner into the concern.[5]

But though the partnership be dissolved, it nevertheless subsists for the purposes of closing up the concern; and if one thereafter die, the other takes the property and books as survivor, subject to account to the personal representatives of the deceased.[6] Surviving partners, it has already been said, are in equity trustees of the partnership effects, and cannot derive any exclusive profit from their use.[7] They may carry on a joint business in the name of the late firm, or in any other name, and limit it to winding up the business of the late firm, or carry on the business generally.[8] They are entitled to close up the concern, and equity will not appoint a receiver and deprive them of this right, if they are responsible and act in good faith.[9] And the bare fact that the survivor resides abroad is no reason for interfering with the exercise of this right through a competent agent.

With respect to third persons, the liability of the partners continues until notice of the dissolution, unless the dissolution be occasioned by the death of one of the partners. Notice of the dissolution in the newspapers is sufficient notice to all persons who have no previous dealings with the firm; but persons who have had previous dealings with the firm are not affected by such notice, but they are entitled to actual notice.[10]

Upon the dissolution of a partnership in any way, and especially in case of insolvency, the intervention of a court of equity to take an account

[1] Seaman v. Waddington, 16 J. R. 510.
[2] 2 R. S. 701, § 20.
[3] Nerot v. Burnand, 4 Russ. 260.
[4] Marquand v. The N. Y. Manufacturing Co. 17 J. R. 525.
[5] Murray v. Bogert, 14 J. R. 318.
[6] Murray v. Mumford, 6 Cowen, 441.
[7] Case v. Abeel, 1 Paige, 393.
[8] Staats v. Howlett, 4 Denio, 559.
[9] Evans v. Evans, 9 Paige, 178.
[10] Graves v. Merry, 6 Cowen, 771. National Bank v. Norton, 1 Hill, 572. Van Epps v. Dillaye, 6 Barb. 244. Wardwell v. Haight, 2 Barb. S. C. R. 549.

of the copartnership transactions, becomes the most available remedy. The partnership effects, in cases of insolvency, are treated, in equity, as a trust fund for the payment of the copartnership debts, and they will be so applied upon the application of either of the partners.[1] They must first be applied to the payment of the partnership debts; and the individual property of the partners to their individual debts.[2]

But when the copartners are administering their own funds, the copartnership creditors have no specific or preferable lien upon the joint funds; nor have the individual creditors any lien or priority of claim upon the separate property of their debtors. It is only when neither the joint nor the separate creditors of the persons composing the firm can reach the property of their debtors, so as to obtain satisfaction by execution at law, that the equitable principle is applied, of paying joint creditors out of the partnership property, and individual creditors out of the separate property of their debtor; when there is not enough to pay both.[3]

While the partners have the legal control of their property, they may distribute it as they see fit among all their creditors, provided they deal justly by all. Hence, they may assign their individual property as well as their partnership property to pay the joint debts of the firm; thereby giving the creditors of the firm a preference in payment out of the separate estate of the assignors, over the separate creditors. And each partner, with the assent of his companions, has the corresponding right to give his individual creditors a preference in payment out of the share of the effects of the firm, which as between him and his copartners, and without reference to the debts for which they are all jointly liable, is legally his own property. But a partner who is insolvent and unable to pay the debts of the firm, has no right to assign his share of the partnership effects to pay the individual debts of his copartner, for which neither he nor his property is legally or equitably liable.[4]

Though the law casts upon the surviving partner the burthen of discharging all the partnership debts, and vests in him the partnership assets for that purpose, still, if he is insolvent, equity will aid the creditors of the firm in obtaining satisfaction out of the property of the deceased copartner.[5] But as long as the surviving partner is of sufficient

[1] Egberts v. Wood, 517.

[2] Wilder v. Keeler, 3 Paige, 167. Kirby v. Schoonmaker, 3 Barb. Ch. R. 46.

[3] Kirby v. Schoonmaker, 3 Barb. Ch. R. 46.

[4] Id.

[5] Hamersley v. Lambert, 2 J. Ch. R. 508. Wilder v. Keeler, 3 Paige, 162 Brown v. Story, 2 id. 594. Butts v. Genung, 5 id. 254. Payne v. Mathews, 6 id. 19. Lawrence v. The Trustees of Leake Orphan House, 2 Denio, 577. 11 id. 80 Smith v. Ballantine, 10 id. 101.

ability to pay, there is no failure of the remedy at law, and no occasion for the extraordinary aid of a court of equity. The weight of authority, in this state, is that the creditor must resort to his legal remedy against the surviving debtors, unless he can show some ground of necessity for coming into equity for relief against the estate of the deceased debtor.[1]

In England a different rule at present seems to prevail. Treating a partnership debt as joint and several, the courts there hold that the creditor may resort at once to the estate of the deceased partner, making the surviving partner a party defendant to the action, without averring or proving the insolvency of the surviving partner.[2] But the chancellor refused to follow these, and a few other recent English cases,[3] holding that the law was otherwise conclusively settled in this state, in conformity to the earlier English doctrine.[4]

A question of great difficulty and importance arises, upon a sale by a creditor under a judgment and execution against one partner, whether only the interest of the partner defendant in the execution is to be sold, or whether the property itself is to be sold and delivered to the purchaser, the latter taking the place of the partner whose share has been sold. It is well settled that the interest of one partner in the partnership property, is only his share, after a settlement of the partnership accounts, and satisfaction of all just claims of the other partners.[5] No greater interest can be sold under an execution against the partner than he possesses. The difficulty consists in the selling of an uncertain interest. Lord Eldon, on one occasion said, if courts of law have followed courts of equity in giving execution against partnership effects, they do not adhere to the principle, when they suppose that the interest can be sold before it has been ascertained what is the subject of sale and purchase. According to the law before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor, without reference to the partnership account; but a court of equity would have set that right, by taking the account, and ascertaining what the sheriff ought to have sold. The courts of law, however, have now repeat-

[1] See cases cited in last note.

[2] Devaynes v. Noble, 2 R. & Myl. 495. Wilkinson v. Henderson, 1 Myl. & K. 582, and see the cases on p. 719. See ante, under head of Fraud.

[3] The Trustees, &c. v. Lawrence, 11 Paige, 85.

[4] Simpson v. Vaughn, by Lord Hardwicke, cited in 2 Ves. 101. Jenkins v. Groot, 1 Cai. C. E. 121. See English rule stated under the head of Fraud, ante, p. 191.

[5] Nicoll v. Mumford, 4 J. Ch. R. 522. Rodriguez v. Heffernan, 5 id. 417. Buchan v. Sumner, 2 Barb. Ch. R. 165.

edly laid down, that they will sell the actual interest of the partner, professing to execute the equities between the parties; but forgetting that a court of equity ascertained previously what was to be sold. How could a court of law ascertain what was the interest to be sold, and what the equities, depending upon an account of all the concerns of the partners for years?[1]

In England it is the law that the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership.[2] And it was laid down by Holt, at an early day, that in an action against one of two or more partners, the sheriff must seize all the goods, because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.[3]

The moment the interest of one of the partners is seized under an execution against him for his individual debt, the partnership in the goods so seized is at an end; and the creditor becomes a tenant in common with the other partner. And when the goods are sold the vendee becomes tenant in common in like manner.[4]

The difficulty and embarrassment arising from the sale of an uncertain interest, necessarily leading to a bill in equity for an account, induced Lord Mansfield to direct a reference to the master in cases of this kind, in order to ascertain the actual interest of the debtor partner before the sale; and to require the sheriff to levy no more than the interest of such partner.[5] This case was followed by Lord Kenyon in a subsequent case.[6] But this mode of ascertaining the interest of the debtor partner was afterwards abandoned, from the extreme difficulty of taking an account at law.[7] If the partnership be of long continuance, or complicated in its nature, it is quite obvious that a satisfactory account can only be taken in equity. Accordingly the practice in England seems to be, when the separate creditor of one partner has taken partnership goods in execution, in discharge of his separate debt, for the other partners to file their bill against the creditor, the debtor partner and the sheriff, praying for an account of the partnership, and payment of what is due to them, and that

[1] Waters v. Taylor, 2 Ves. & B. 301, per Lord Eldon.

[2] Per Lord Alvanly, 3 B. & Pull. 289.

[3] Heydon v. Heydon, 1 Salk. 392. Jacky v. Butler, 2 Ld. Ray. 871.

[4] Fox v. Hanbury, Cowp. 449. Skip v. Harwood, 2 Swanst. 586. Field v. ——, 4 Ves. 396. 3 C. & P. 306. Marquand v. N. Y. Manu. Co. 17 J. R. 525. Walsh v. Adams, 3 Denio, 7.

[5] Edie v. Davidson, Doug. 650.

[6] See the case as stated by Best, Serj. in Parker v. Pistor, 3 B. & Pull. 288.

[7] Chapman v. Koops, 3 B. & P. 289.

the sheriff may be restrained from proceeding under the execution and selling the stock and effects; and a court of equity will give relief accordingly.[1]

If in cases of this nature, execution be executed before an injunction can be obtained, the court will stay the money in the hands of the sheriff, until the account can be taken.[2] Under this doctrine the sale does not in truth transfer any part of the joint property to the vendee, so as to enable him to take it from the other partners. It gives him merely a right in equity to call for an account, and thus to entitle him *to the interest* of the partner in the property, which on the settlement of the account, shall be ascertained to exist. It is clear such an account can only be taken in a court of equity.

There are some of the New-York cases, which incline to adopt the same rule. Thus, where an attachment had issued under the act for relief against absent and absconding debtors,[3] against one partner for his individual debt, the partner having absconded, and thus become liable to the process of attachment under the act, the court upon a motion to discharge the attachment which had been levied upon the property of the copartnership, directed the property so seized to be restored.[4] The court in disposing of the motion said: where an execution is issued for the separate debt of one partner, it has been the constant practice to take the shares which such partner has in the partnership property, but it has been settled, at least since the case of Fox v. Hanbury, (Cowp. 445,) that the sheriff can sell only the actual interest which such partner has in the partnership property after the accounts are settled, or subject to the partnership debts. The separate creditor takes it in the same manner as the debtor himself had it, and subject to the rights of the other partner. The sheriff, therefore, does not seize the partnership effects themselves, for the other partner has a right to retain them, for the payment of the partnership debts. And elsewhere, in the same opinion, after putting an attachment upon the footing of an execution, they say, "the aheriff can take the separate property only, of the absconding debtor. He cannot seize the partnership effects, for the other partner has a right to retain and dispose of them, for the payment of the partnership debts."[5]

Shortly before the case of Ex parte Smith, in the supreme court, Chancellor Kent held that the interest of one partner in the partnership prop-

[1] Coll. on Part. 478. 1 Mad. Ch. Pr. 112. Bevan v. Lewis, 1 Sim. 376. Lownes v. Taylor, 1 Mad. Ch. R. 422. Taylor v. Fields, 4 Ves. 396. Young v. Keighly, 15 id. 563.

[2] Coll. on Part. 478.

[3] 1 R. L. of 1813, p. 157.

[4] Matter of Smith, 16 J. R. 102.

[5] Matter of Smith, supra, and note to that case.

erty might be taken and sold under an execution at law, on a judgment against such partner for his separate debt; and that a court of equity would not stop such execution or sale by injunction, to enable the partnership accounts to be taken and liquidated.[1] He said the principle would go to stay executions at law in every case, against the partnership property of one partner who owed separate debts, until the disclosure and liquidation of the copartnership. This would produce inconceivable delay and embarrassment, in respect of the separate creditors. If those creditors can sell only subject to the joint creditors, there is no harm in suffering them to go on at law; and if any sacrifice of the interest of the separate partner is made by reason of the uncertainty, it affects only that partner who does not here raise the objection. But this case did not present the question whether the property of the partnership itself might be sold and delivered to the vendee, subject to an account, or whether only the *interest of the partner* might be sold, without disturbing the possession of the other partner.

But whatever may have been the opinion of the chancellor on that question, it has since been set at rest in this state. The principle is now stated to be, that on an execution against one of two partners, the sheriff may seize the *entire partnership effects*, or so much as may be necessary to satisfy the execution, and sell the interest of the partner against whom the execution is issued, and deliver the property so sold to the purchaser, against the will of the other partner; and the other partner cannot maintain an action against the sheriff for such sale and delivery.[2] It is conceded, however, that the purchaser takes subject to an account between the partners, and to the equitable claims of the creditors of the firm in the name of the other partner.

In the case of Phillips v. Cook, (supra,) the plaintiff claimed as assignee of the partners for the benefit of the creditors generally, and the action was brought in trespass *de bonis asportatis*, against the defendant, a deputy sheriff, for taking and selling the goods under an execution against one of the partners, for an individual debt of such partner. The court treated the action as if it had been brought by the partners, it being brought by trustees claiming under an assignment made subsequent to the levy. The court held that the action could not be maintained. They said that at law, the sheriff may seize and sell the interest of a partner in all choses in possession, the same as he may that of any joint tenant or tenant in common. They adopt the language of Holt, Ch. J., in Pope v. Haman, (Comb. 217:) "Upon a judgment against one partner, the sher

[1] Mody v. Payn, 2 J. Ch. R. 548. [2] Phillips v. Cook, 24 Wend. 389.

iff may take the goods of both in execution; and the other partner hath no remedy at law, otherwise than by retaking the goods, if he can; for the vendee of the sheriff becomes tenant in common with the other co-partner." The whole subject and the cases in this country are extensively reviewed by the learned judge who delivered the opinion in the case under consideration. The doctrine is put upon common law principles, and not upon any change introduced by statute.

In an earlier case, Savage, Ch. J., while he held that trespass or replevin would not lie against a sheriff for a levy under such circumstances, seemed to think that the court from which the execution issued would stay proceedings upon it to give time to have an account taken in equity.[1]

The doctrine of Phillips v. Cook has been repeated in numerous other cases, and is the settled law in this state. Thus, in quite a recent case, Jewett, J., in delivering the opinion of the court said, he considered it well settled that upon an execution against one of several partners, the sheriff may take the goods of the partnership in execution, and sell the individual share or interest of the defendant, and in doing so, he may take possession of, remove and deliver the entire property taken, to his vendee. When the goods are so sold by the sheriff, the purchaser becomes a tenant in common with the other partners. He is entitled not to the goods of the partnership, but to the interest in the goods of the partner against whom the execution was, encumbered with the joint debts of the partnership, and subject to account for the full value in favor of partners, and through them to creditors. Neither party has any thing separately, in the *corpus* of the partnership effects; but the interest of each is only the share of what remains after the partnership accounts are taken. The accountability of the purchaser does not depend in such case, on the fact of notice. No greater interest can be sold than the judgment debtor possessed.[2]

But though the sheriff may, under an execution against one partner, take the actual possession of the partnership goods, and deliver the possession to the vendee after the sale, he cannot sell the interest of the other partners, not named in the execution Should the officer in such a case, assume to sell the whole property, he would, it seems, be liable to an action, at the suit of the partner not a party to the execution, but the debtor partner cannot be joined in such action.[3]

[1] Scrugan v. Carter, 12 Wend. 134.

[2] Walsh v. Adams, 3 Denio, 125, 128. Ex parte King, 17 Ves. 115. Church v. Knox, 2 Conn. R. 523. Burrall v. Acker, 23 Wend. 606.

[3] Waddell v. Cook, 2 Hill, 47, and note a, overruling Messereau v. Norton, 15 J. R. 179. See also White v. Osborn, 21 Wend. 72.

The apparent discrepancy in the New-York cases was attempted to be reconciled by Cowen, J., in Phillips v. Cook, (supra,) by the fact that in Smith's case, (16 J. R. 102,) the question arose upon a special motion, addressed to the equity powers of the court; and that the question in Wilson v. Conine, (2 J. R. 280,) arose upon a motion for a new trial upon a case, addressed to the equity of the court, and was decided, therefore, according to the rule prevailing in chancery, and not according to the rule prevailing in courts of law. There is force in these suggestions.

What effect upon this question, the union and blending of law and equity in the same court will have, has not yet been settled. There can be less objection now, than under the old practice, to stay a sale on an execution against one partner, until the copartnership accounts are taken, as was suggested by Savage, Ch. J., in Scrugan v. Carter, (supra,) to be the true course. One court would not now be waiting the action of another court. But the whole proceeding being in the same court, could be so moulded as to ascertain the exact interest applicable to the execution, with the least possible delay.

In a case in the court of errors, about the time the case of Phillips v. Cook was decided by the supreme court, the chancellor said that the interest of a copartnership in the partnership goods might be levied upon and sold, and that after the levy and previous to the sale, the sheriff is authorized to take a joint possession with the other members of the firm; but the case did not call for a decision, nor did he decide, whether the sheriff could, in such a case, take the *exclusive* possession.[1] The chancellor adverted to the fact, that the revised statutes had authorized a *special interest* in personal property to be sold on execution, but he, nevertheless, spoke of the sale of the interest of a copartner in the partnership effects on an execution against him alone, as justified upon common law principles.

The question as to the construction of the New-York statute relative to the sale of personal property on execution, and especially of the sale of a *right and interest* of a party in such property, has been decided by the supreme court, and affirmed by the court of appeals, on an equal division of the members. Thus, at common law, goods pawned or pledged, are not liable to be *taken* in execution in an action against the pawnor or pledgor.[2] The New-York Revised Statutes enact, that where goods or chattels shall be pledged for the payment of money or the perform-

[1] Burrall v. Ackar, 23 Wend. 610.

[2] Stief v. Hart, 1 Comst. 20, 28. Wilkes v. Ferris, 5 J. R. 336. Marsh v. Lawrence, 4 Cowen, 461. Pomroy v. Smith, 17 Pick. 85. Story on Bailment, § 353. Otis v. Wood, 3 Wend. 500.

ance of any contract or agreement, the right and interest in such goods of the person making such pledge, may be sold on execution against him and the purchaser shall acquire all the *right and interest* of the defend ant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.[1]

In Stief v. Hart, the question arose, whether the sheriff holding an execution against the pledgor of goods, might by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, and sell the *right and interest* of the pledgor therein. The supreme court held the affirmative of this question, and their judgment was affirmed *pro forma* by the court of appeals. It was, however, held, that after the sale, the pledgee was entitled to the possession until the purchaser redeemed it from the pledgee.[2] The question was decided, not upon common law principles, but upon the construction of the New-York statute relative to executions against property.[3] The statute, after authorizing the sale upon execution against the pledgor, of his right and interest in the goods, enacts, in a subsequent section, that no personal property shall be exposed for sale, unless the same be present, and within the view of those attending such sale. Unless the sheriff can take the possession from the pledgee, he cannot fulfill this requirement of the law; and this was the ground on which the cause was decided by the supreme court.[4] The sheriff, however, is not authorized, as on the sale of property held in common on an execution against one, to deliver the possession to the purchaser; for this would be putting the property beyond the reach of the pledgee.[5]

It is quite obvious in this case, that though the possession may thus be taken from the pledgee by the sheriff, that the purchaser acquired by his purchase a mere equity, and that the pledgee is entitled to the possession after the sale, until the redemption by the purchaser. Under this construction of the act, the possession of the pledgee is no further disturbed than is necessary to fulfill the requirement of the statute, that personal property, sold under an execution, must be present and within the view of those attending the sale.

The effects of a partnership on the death or insolvency of one or more of the copartners, can in no way be administered but in a court of equity. An action at law is wholly ineffectual to adjust the conflicting equities which generally grow out of such transactions. Not only is the remedy at law

[1] 2 R. S. 366.
[2] Stief v. Hart, 1 Comst. 20.
[3] 2 R. S. 365.
[4] Bakewell v. Ellsworth, 6 Hill, 484. Saul v. Kruger, 9 How. Pr. R. 572.
[5] Waddell v. Cook, 2 Hill, 47. Walsh v. Adams, 3 Denio, 127.

imperfect and inadequate, but in many cases it does not reach the difficulties of the case. The advances of the copartners in their business may be greatly unequal; one may have loaned to the firm large sums of money to enable it to sustain its operations, and may thus become largely a creditor of the firm. At law he can bring no action against his companions, nor against the firm, for he cannot sue himself. His remedy, therefore, is in equity, which looks at the substantial rights of the parties without reference to the technical difficulties which the rigid rules of a court of law interpose to such an action.

It not unfrequently happens that the same individual may be a member of several firms, which have extensive and complicated dealings together. In such a case, neither of the firms can maintain an action at law against the other. On the dissolution of either of the firms, by death or insolvency, their affairs can only be adjusted by a suit in equity, in which all the parties interested are brought before the court. In taking such account for the distribution of the property, thus treated as a trust fund, the partnership creditors are entitled, in the first instance, to be satisfied out of the partnership effects; the separate or private creditors of the individual partners, from the separate and private estate of the partners, with whom they have made private and individual contracts; and the private and individual property of the partners is not to be applied to the extinguishment of partnership debts until the separate and individual creditors of the respective partners shall have been paid.[1] In a court of law the preference of the joint creditors to the joint fund, and of the individual creditors to the individual property, are in general disregarded. A joint creditor may at law proceed directly against the separate property of one of the partners, and an individual creditor against the partnership effects, in disregard of the equities of the parties, so that a resort to a court of equity becomes in the end indispensable. The creditors, indeed, of the partnership have no lien, as such, upon the partnership effects, but their preference to the joint estate, is worked out through the equity of the partners.[2]

It is scarcely necessary to add, in concluding this chapter, that the power of one partner to bind the firm ceases with the dissolution.[3] And

[1] Murrill v. Neill, 8 How. 414, 426. Murray v. Murray, 5 J. Ch. R. 73–77. Ex parte Crowder, 2 Vern. 706. Ex parte Cook, 2 P. Wms. 509. Ex parte Hunter, 1 Atk. 228. McCulloch v. Dashiel's Admins. 1 Hill & Gill, 96, 99–107. Wilder v. Keeler, 3 Paige, 167. Kirby v. Schoonmaker, 3 Barb. Ch. R. 46.

[2] Ex parte Elton, 3 Ves. 240. Ex parte Clay, 6 id. 813. Ex parte Ruffin, id. 125, 126.

[3] Mitchill v. Ostrom, 2 Hill, 520. Sutton v. Dillaye, 3 Barb. 529. Lansing v. Gaine, 2 J. R. 300. Sandford v. Mickles, 4 id 224.

though in some of the earlier cases in this state it was held, that the acknowledgment of the present existence of a debt by one partner, after the dissolution of the firm, was sufficient to take the case out of the statute of limitations, that doctrine has since been exploded.[1] And even a part payment by one of several joint debtors, of a demand which was formerly, upon the principle of agency, treated as an acknowledgment by all who were benefited by the payment, has been held not to have that effect.[2] Such act can only operate against the party by whom it was performed, and does not prejudice his associates, unless indeed they have authorized him to do it.

[1] Van Keuren v. Parmelee, 2 Comst. 523; overruling Smith v. Ludlow, 6 J. R. 267. Johnson v. Beardsley, 15 id. 3. Patterson v. Choate, 7 Wend. 441.

[2] Shoemaker v. Benedict, 1 Kern. 176, thus overruling Reid v. McNaughton, 15 Barb. 168. See ante, 191, note.

CHAPTER XI.

OF CORPORATIONS, AND OF PROCEEDINGS AGAINST THEM IN EQUITY.

SECTION I.

OF CORPORATIONS; AND OF PROCEEDINGS AGAINST THEM IN EQUITY, INDEPENDENTLY OF THE REVISED STATUTES.

THE full discussion of the law in relation to corporations would require a separate treatise. The subject has been already well examined, and the law conveniently digested by a work of established reputation in this country.[1] The jurisdiction in relation to most questions connected with corporations, belongs to courts of law. There are, however, some subjects, over which courts of equity have long had cognizance, some of which have been noticed in the chapter on charities, and there are many others which have been, in this state, devolved upon courts of equity by the legislature. A few remarks on the nature and kind of corporations existing amongst us, and their general powers and duties, seem necessary to a proper understanding of the jurisdiction of courts of equity over them.

A corporation, as defined by Chief Justice Marshall, in a celebrated case,[2] is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it is created. Among the most important are immortality, and if the expression may be allowed, individuality; properties by which a perpetual succession of

[1] See Angell & Ames on Corporations. [2] Dartmouth College v. Woodward, 4 Wheat. 636.

many persons is considered as the same, and may act as a single individual." And in another case, the same learned judge said: the great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.[1] The Revised Statutes of this state have declared what powers are possessed by every corporation. Thus, it is enacted,[2] that every corporation, as such, has power, 1. To have succession by its corporate name, for the period limited in its charter; and when no period is limited, perpetually. 2. To sue and be sued, complain and defend in any court of law or equity. 3. To make and use a common seal, and alter the same at pleasure. 4. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. 5. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation. 6. To make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock. These powers, it is declared, vest in every corporation, thereafter created, although they may not be specified in its charter, or in the act under which it shall be incorporated. In addition to the powers thus enumerated, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, it is further declared that no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.[3] These enactments seem merely to be in affirmance of the common law.[4]

Corporations are divided into public and private corporations. The former embrace all municipal corporations, as well as towns and counties, which latter have many of the attributes of a corporation, and indeed are bodies corporate;[5] and the latter all civil and religious corporations.

Corporations with respect to the number of persons of whom they are composed, are of two kinds, *aggregate* and *sole*. A corporation sole consists of a single person, who is made a body politic, in order to give him some legal capacities, and especially that of perpetuity, which a natural person cannot have. A bishop, dean, parson and vicar are given in the

[1] Providence Bank v. Billings, 4 Pet. U. S. R. 562.

[2] 1 R. S. 599.

[3] 1 R. S. 600, §§ 2, 3,

[4] See Angell & Ames on Corporations. Introduction, passim. 1 Bl. Com. 494 et seq. 2 Kent's Com. 267 et seq. Beaty v The Marine Ins. Co. 2 J. R. 108. The People v. Utica Ins. Co. 15 id. 383. N. Y. Fire Ins. Co. v. Ely, 2 Cowen, 699. Ex parte Wilcox, 7 id. 402. Hosack v. The College of Physicians, 5 Wend. 547, 552. Head v. The Providence Ins. Co. 2 Cranch, 127. See note at the end of the case in Peters' condensed edition.

[5] 1 R. S. 337–364.

English books as examples of sole corporations. They and their successors in perpetuity take the corporate property and privileges. The word successors is in general as essential for the succession of property in a corporation sole, as the word heirs to create an estate of inheritance in a private individual.[1] But the word *successors* in a grant to a corporation aggregate is not indispensable to pass a fee, because it is a body which is in its nature perpetual.[2] There are few instances of corporations sole in this state. The register and clerks in chancery, the supervisors of towns and perhaps some other officers are treated as a quasi corporation sole, and bonds taken to them and their successors in office, are enforced by the successor.[3] A corporation aggregate was defined by Story, J., in the case of Dartmouth College v. Woodward, already cited, to be at common law a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges and capacities in its collective character, which do not belong to the natural persons composing it. Among others it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises, which though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence such a corporation may sue and be sued by its own members; and may contract with them in the same manner as with strangers.[4]

Corporations are again divided in England into *ecclesiastical* and *lay*. "Ecclesiastical corporations," says Blackstone, "are where the members who compose it, are entirely spiritual persons; such as bishops, certain deans and prebendaries; all arch-deacons, parsons and vicars, which are sole corporations; deans and chapters at present, and formerly prior and convent, abbots and monks, and the like; bodies aggregate."[5] We have not in this state any corporations answering to this description. The religious corporations formed under our general act,[6] are not composed of ecclesiastical persons, and are expressly created to take into their possession and custody all the temporalities belonging to the church, congregation or society, as the case may be; they are to repair and alter churches

[1] Co. Litt. 8 b, 9 a, 94 b.
[2] Id.
[3] 2 R. S. 172, § 27. Jansen v. Ostrander 1 Cowen, 670.
[4] 4 Wheat. 667, 668. 1 Bl. Com. 494, 495.
[5] 1 Bl. Com. 497.
[6] 2 R. L. of 1813, p. 212.

or meeting houses, and to erect others if necessary, and to erect dwelling houses for the use of their ministers, and school houses and other buildings for the use of the church, congregation or society. In short, it is their business to manage the temporal affairs of the church, congregation or society. It has been held in this state that they are mere civil corporations.[1]

Lay corporations are again divided into eleemosynary and civil. The former are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick and impotent; and all colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations.[2] The religious corporations formed in this state, under the general act, are not, it seems, eleemosynary, but private civil corporations within the proper definition of those terms.[3]

Civil corporations are formed for a variety of purposes, and embrace all others not before mentioned. They are public or private. Public corporations have just been noticed, and are esteemed such as exist for public political purposes only, such as towns, cities, counties and the like. They are founded for public purposes by the government, and although private interest may be affected by them, they are still public corporations.[4] Under the denomination of private corporations may be embraced all banking corporations, insurance companies, manufacturing companies, railroad companies, turnpike and plank road companies; religious incorporations formed under the statute, and corporations, whether formed under general laws or otherwise, which have been created for an almost innumerable variety of objects. In all these cases, the uses may in a certain sense, be called public, but the corporations are private.[5]

Eleemosynary corporations, such as hospitals, colleges and the like, though often called in common language public institutions, are in the legal acceptation of the term, private corporations.[6]

It is generally agreed that the invention of corporations is attributable to the Romans; and it is evident that the capacities and incapacities of these institutions bear a striking resemblance to those under the civil

[1] Robertson v. Bullions, 9 Barb. 64; affirmed on appeal, 1 Kern. 243.

2 Kent's Com. 274. 2 Bl. Com. 498. Per Hand, J. in Robertson v. Bullions, 9 Barb. 89. 4 Wheat. 669 et seq. per Story, J.

[3] Robertson v. Bullions, 9 Barb. 89, per Hand, J.; S. C. aff. on app. 1 Kern. 243.

[4] Dartmouth College v. Woodward, 4 Wheat. 668 et seq. per Story, J.

[5] Id.

[6] Id.

laws.[1] This is especially so, with respect to those corporations where the principle of personal liability of the stockholders has been superadded, either in a direct or in a qualified manner, to that of the corporation. Such corporations are in effect mere partnerships with some of the attributes of a corporation.[2]

The mode by which corporations are created has some bearing upon the remedies against them; especially, the extreme remedy, that of dissolution. In England they exist by prescription, by royal charter and by act of parliament. In this state, corporations were created before the revolution, by charter under the great seal of the colony, as representing the prerogative of the crown. After the revolution they were created by act of the legislature. Subsequently, they were authorized to be formed under general laws, for particular purposes, such as for religious purposes,[3] for erecting public libraries,[4] and for manufacturing purposes.[5] By the constitution of 1821, a restriction was sought to be imposed upon the increase of corporations by legislative enactment, by requiring the assent of two thirds of the members elected to each branch of the legislature to every bill, creating, continuing, altering or renewing any body politic or corporate.[6] The increased number of acts of incorporation, passed during the continuance of that legislative restriction, sufficiently shows that it signally failed of its object. And accordingly, under the constitution of 1846, now in force, the legislature is forbidden to create corporations, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. A marked preference is given to the formation of corporations under general laws. And the general and special acts passed pursuant to that section, are permitted to be altered from time to time, or repealed.[7] The constitution also provides for securing dues from corporations, by such individual liability of the corporators and other means as may be prescribed by law. The term corporations, as used in the constitution, is declared to include all corporations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. And all corporations are declared to have the right to sue, and are made subject to be sued in all courts in like cases as natural persons.[8] The legislature has no power to pass any act granting

[1] Ang. & Ames on Corp. 40 43.

[2] Penniman v. Briggs, 1 Hopk. 304. Slee v. Bloom, 19 J. R. 473, per Spencer, Ch. J. Allen v. Sewall, 2 Wend. 327. Moss v. Oakley, 2 Hill, 265.

[3] 1 Greenl. 70.

[4] L. of 1796, ch. 43, sess. 19.

[5] Sess. 34, ch. 67. 1 R. L. 245.

[6] Const. 1821, art. 7, § 9.

[7] Const. of 1846, art. 8, § 1.

[8] Id. §§ 2, 3.

any special charter for banking purposes; but corporations or associations may be formed for such purposes, under general laws.[1] The constitution provides that stockholders in every corporation and joint stock association for banking purposes, issuing bank notes, or any kind of paper credits to circulate as money, after the first day of January, 1850, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind, contracted after the said day.[2] The legislature has acted under these provisions of the constitution, and enacted various general laws under which most of the recent railroad, plank road, banking and insurance incorporations have been formed.

All corporations, whether created by charter or under general laws, can hold and possess real and personal property, and alienate the same, except when restrained by the terms of their charter or by law. At common law, they are not restricted as to the amount of property they may hold, and they possess with respect to it, the same right of disposition that is enjoyed by a natural person.[3] In most of the charters or acts of incorporation, there is a limitation as to the amount of the property to be held, and a restriction as to the power of alienation. The general powers of every corporation, as has been already mentioned, are, amongst other things, to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.[4] This enactment is no broader than the common law. We have not enacted the restraining acts, passed in the reign of Elizabeth.

With respect to religious corporations formed under the general act of 1784,[5] although they were authorized to have, take, receive, acquire, purchase, use and enjoy lands, tenements and hereditaments and goods and chattels, their power of disposition was limited to demise, lease and improve the said land, tenements and hereditaments. Special acts of incorporation were occasionally granted, both before and after the passing of the general act, without restriction as to the power of alienation.[6] The necessity of selling their estate was sometimes felt by corporations formed under the general act, and relief was frequently granted by special acts of the legislature authorizing such sale.[7] At length in 1806, the

[1] Const. of 1846, art. 8, § 4.

[2] Id. art. 8, § 7.

[3] Co. Litt. 44 a, 300, b. Bac. Abr. tit. Corporation, E, p. 448. Dutch Church v. Mott, 7 Paige, 83.

[4] 1 R. S. 599, sub. 4.

[5] 1 Greenl. 71.

[6] See Sixth Sess. ch. 17. 1 Greenl. 60

[7] See 26th Sess. chs. 76, 77, as specimens of these acts. 29th Sess. ch. 5. 28th Sess. ch. 28. Id. ch. 33. Id. ch. 16.

general act was so amended that the chancellor was authorized, upon the application of any religious corporation, in case he should deem it proper, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the money arising therefrom, to such uses as the same corporation, with the consent and approbation of the chancellor, should conceive to be most for the interest of the society to which the real estate so sold belonged; but this provision did not extend to any of the lands granted by the state for the support of the gospel.[1] And hence, applications to the legislature for relief continued occasionally to be made, after the chancellor was thus clothed with a limited authority in the matter.[2] The general act was revised in 1801 and again in 1813, and continues at this day the law of this state.[3] The principal difficulty with respect to the alienation of real property held by a religious corporation, was that the legal estate in the hands of the purchaser, with notice of the trust, would be chargeable with the charitable uses to which it was originally devoted. Real estate held by a corporation for its ordinary purposes might be sold and conveyed in the same way as a natural person might dispose of his own property. But real property held by a corporation to charitable uses, would be followed by a court of equity into the hands of the alienee with notice.[4] And the chancellor said in the case of the Dutch Church v. Mott, that the intention of the legislature, by the act of 1806, amending the general act as to religious incorporations, was to give to every religious corporation an unlimited power to convey any real property, held by them in trust for the corporators, provided the previous consent of the court to such alienation of the church property, and a direction for the proper application of the proceeds thereof for the benefit of the corporators, was obtained in the summary mode which is there prescribed. That religious corporations, formed under the general act, cannot now alien their real estate, without the leave of the court, which may now be granted by the supreme court, and by the county court,[5] is obvious from the course of our legislation on the subject, and is well sustained by authority.[6]

A corporation may be seised of lands in trust, provided the objects of the trust be not foreign from its institution.[7] But the loan officers of a county, who are by law a corporation, cannot receive a grant of land for

[1] 29th Sess. ch. 43.

[2] 34th Sess. 159.

[3] 2 R. L. 212. 3 R. S. 292.

[4] The Mayor, &c. v. Lowten, 1 V. & B 226, 246. Dutch Church v. Mott, 7 Paige 84.

[5] Code, § 30.

[6] Viele v. Osgood, 8 Barb. 130. Voorhies v. Presbyterian Church of Amsterdam, id. 135. Montgomery v. Johnson, 9 How. Pr. R. 232.

[7] Jackson v. Hartwell, 8 J. R. 422.

the use of a town, or of a church; nor can the supervisors of a county, who are also a corporation, take a grant of land for a particular town.[1] The reason is, that it is beyond the capacity of the corporation. Numerous cases were referred to under the chapter relative to charities, which it is unnecessary here to repeat. The support of particular doctrines or systems of worship or church government, or a connection with some particular church judicatory, may be made a condition in a grant or donation to a religious society formed under the act.[2] Such condition, if explicit and clear, and free from all doubt or obscurity, would be good. An uncertain condition would be void. The title of the trustees under such a deed would be good, so long as a majority of the corporators chose to abide by the condition; and when that was departed from, their title would be forfeited.[3]

[1] Jackson v. Hartwell, 8 J. R. 422.

[2] Robertson v. Bullions, 9 Barb. 66; S. C. 1 Kern. 243.

[3] Per Selden, J. in same case, p. 265.

It would seem that a corporation formed under the act for the Incorporation of Religious Societies, (3 R. S. 292, § 4,) may execute any trust which comes within the scope and object of its institution. By the fourth section it is empowered to take into its possession and custody all the temporalities belonging to such church, congregation or society, whether real or personal, and whether obtained by gift, grant, or devise, directly to such church, congregation or society, or to any other person for their use. It is authorized also to hold and enjoy all the debts, demands, rights and privileges, and all churches, meeting houses, parsonages and burying places, with the appurtenances, and all estates belonging to such church, congregation or society, in whatsoever manner the same may have been acquired, or in whose name soever the same may be held, as fully and amply as if the right or title thereto had originally been vested in the said trustees; and also to purchase and hold other real and personal estate, and to demise, lease and improve the same, for the use of such church, congregation or society, or other pious uses, so as the whole do not exceed in annual value the sum limited by the act. The corporation is also authorized to repair and alter their churches or meeting houses, and to erect others if necessary, and to erect dwelling houses for the use of their ministers, and *school houses and other buildings for the use of such church, congregation or society.* The trustees are also empowered to make rules and orders for the managing the temporal affairs of such church, congregation or society, and to dispose of all moneys belonging thereto; and to regulate and order the renting the pews in their churches and meeting houses, and the perquisites for the breaking of the ground in the cemetery or church yards, and in the said churches and meeting houses for burying the dead, and all other matters relating to the temporal concerns and revenues of such church, congregation or society.

Nor is it necessary that a bequest to the corporation should be for all the purposes to which property may be applied. If the bequest or grant be to the corporation for any one or more objects for which the corporation was formed, it will be valid. And it is not essential that it should be expressed to be for *all* the purposes for which it was instituted. Hence

From what has been said, it is obvious that there are numerous cases in which the interposition of courts of equity is necessary, against corporations. It remains to consider what class of corporations are amenable to the court, and what is the general nature of the relief which can be granted.

In considering the doctrine of injunction, we had occasion to bring to the notice of the learned reader a variety of cases, in which that process

a bequest to pay the salary of the minister was held to be a good testamentary disposition of property. (Williams v. Williams, supra.) It is conceived that it would be equally valid, if it comes within any of the purposes of the corporation, although its immediate benefits are enjoyed only by a portion of the society. Thus, it is believed the communion furniture may be held in trust for the members of the church in full communion, and the school books of the sabbath school in trust for that portion of the congregation who are interested therein. Such trust may, indeed, in one sense, be said to be for the benefit of the whole society; for without an organized church no religious society could long exist. (See remarks of Selden, J., in Robertson v. Bullions, 1 Kernan, 263, which apparently conflict with these views.)

From the authority given to the trustees to erect school houses, &c., for the use of the church, congregation or society, it is to be inferred that the legislature of 1784 intended to provide for the establishment of primary schools for the education of the children belonging to the congregation. And although subsequent legislation has provided a different system of primary education for the children of the state, and superseded, in a great measure, the necessity for parish schools connected with churches; yet the provision in question has not been repealed, and the trustees of religious societies may, it is believed, accept and execute trusts for the support of such schools. Indeed, there is no reason to doubt that the giving of a corporation to religious societies, was not intended to withdraw them from the protection of the law, which every voluntary association for the purpose of religion and charity before enjoyed; but to render the rights of all more stable and secure. The statute makes the trustees the corporation; and treats the society as the constituent body. There are incidental remarks of judges in some of the cases tending to show that the *members* of the society are the corporation. (Baptist Church v. Witherill, 7 Paige, 296. Lawyer v. Sipperly, id. 281. Miller v. Gable, 2 Den. 492. Robinson v. Bullions, 9 Barb. 64. S. C. 1 Kern. 248.) But the express language of the statute is otherwise; and the earlier cases treated the trustees alone as the corporation in distinction from the society. (Compare §§ 3 and 16 of the general act of 1813, 3 R. S. 295, 299. The People v. Runkle 9 J. R. 147.) The object of the act was doubtless to give the voluntary association called a church, or congregation, a corporation to hold and manage its temporalities. The 16th section of the general act speaks of the corporation as a distinct body from the religious society connected with it.

This view is confirmed by subsequent legislation on the same subject. Thus, by the act for the incorporation of societies to establish free churches, passed April 13, 1854, (L. of 1854, p. 494,) *the persons named in the certificate as trustees and their successors*, being citizens of the

of the court may be applied, in staying the committing of breaches of trust, and other fraudulent alienations of property. We saw that equity had a jurisdiction over municipal corporations in this respect. It is to be inferred from what has been said, that this jurisdiction existed at common law independently of the statute. We shall now proceed to notice briefly some of the cases where relief is granted by courts of equity against corporations, by virtue of their inherent jurisdiction over trusts and frauds, and other subjects of equitable relief; and some of the cases where it may be granted by statute.

Relief may be granted by courts of equity against a municipal corporation as well as against a natural person. There is no distinction between a municipal corporation and any other corporation aggregate, in respect to the power of a court of justice over its proceedings. The constitution declares that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.[1]

United States, are declared a body politic and corporate. And the act of 1855, entitled "an act in relation to conveyances and devises of personal and real estate for religious purposes," which was enacted while these sheets were passing through the press, is based upon the same theory; and was obviously framed to compel religious societies, which had declined to avail themselves of the privileges of the general act of 1784 as revised in 1813, to organize a corporation under one act or the other. The act of 1855 speaks of the corporation as one body, and the religious society whose property it manages as another.

If we look at the act for the incorporation of benevolent, charitable, scientific and missionary societies, passed April 12, 1848, (L. of 1848, p. 447.) and the amendment of 1849, (L. of 1849, p. 400,) we shall find further confirmation of the same idea. By this act, not only the persons who sign the certificate, but their associates and successors, on conforming to the requirements of the act, become a corporation. The act speaks of the *society* as being thus incorporated. To make it more clear, it is expressly enacted, that the provisions of the act shall not authorize the formation of any incorporation, which can be incorporated under the act entitled "an act to provide for the incorporation of religious societies, passed April 5, 1813, and the several acts amending the same." It is quite plain that the legislature did not intend that the religious society itself should be incorporated, but that it should be furnished with a corporation composed of laymen or a majority of laymen, by which its temporalities should be held and managed. Hence the reason why religious societies are forbidden to be incorporated under the general act of 1848.

Under this view of the subject, it is obvious that the relation of trustee and *cestui que trust* subsists between the corporation and the religious society to which it is attached. It is therefore within the undisputed jurisdiction of courts of equity to enforce the execution, and correct the abuses, in the administration of the trust property.

[1] Const. art. 8, § 3. Davis v. Mayor of N. Y. 1 Duer, 451.

But there are some acts which a municipal corporation, acting within the limits of its charter, may do without any of its doings being liable to the supervision of any court. Thus the common council of New-York has large legislative and discretionary duties to perform, and whether the laws and ordinances it makes, within its jurisdiction, be wise or unwise, be made with good or bad motives, it is not the province of the court to inquire. But with regard to the acts of the corporation in reference to its private property, it stands upon the footing of other corporations. Its corporate property is held in trust for the benefit of its constituents, and it is bound to administer it faithfully, honestly and justly. And if it is guilty of a breach of trust, by disposing of its valuable property, without any or for a nominal consideration, it will stand upon the same footing as if it were the representative of a private individual, or of a private corporation.[1] The mere fact, in such a case, that the forms of legislation are used, in committing such breach of trust, will make no difference in the character of the act. It will not be in any sense the exercise of a political power delegated for public purposes. And the privilege of exemption from judicial interference terminates where legislative action ends.[2]

This subject has been very recently and ably discussed in the courts of the city of New-York, in the controversy relative to the grant by the common council of the right to lay a railway in Broadway in that city.[3] The duty of the court to interpose by injunction, at the instance of the tax-payers, to restrain the commission of acts amounting to a breach of trust, was strongly enforced. "No corporation," said Roosevelt, J., in one of the cases, "whether moneyed or municipal, having stockholders or constituents, has a right without their consent, to give away the property intrusted to its care The exclusive privilege of laying a rail track and running cars, and receiving pecuniary emolument therefrom, like the franchise of a bridge or ferry, or other incorporeal hereditament, is as much a subject of property as the park or the city hall, or the moneyed contents of the city treasury. To grant such a privilege to a few favored individuals, without any public equivalent, is in principle the same as a resolution or an ordinance of the common council directing a division of the funds of the city, raised by taxation, among the members themselves. Such acts, whether done or threatened, are all alike gross breaches of trust, and subject as such to the jurisdiction of the supreme court sitting as a court of equity."

[1] Milhau v. Sharp, 15 Barb. 194.
[2] Id.
[3] Id Stuyvesant v. Pearsall, 15 Barb. 245. Davis v. Mayor of N. Y. 1 Duer, 453; affirmed by the court of appeals.

The principle extends to all corporations, municipal or civil. They are all alike liable for a fraudulent breach of trust. As was said by the chancellor, in the Attorney General v. Utica Insurance Co.,[1] if the directors of the company were to appropriate the funds, or capital of the company to their own private emolument; or if, disregarding the business of insurance, they were to divert the funds to the destruction of that object, by making roads and canals, or building theatres or churches, he had no doubt a court of equity would have a right, and would be bound, to interfere and check the abuse.

The cases which have been considered were not decided upon the ground that a railway in a city is a nuisance, either public or private, but upon the ground of a fraudulent breach of trust. It was conceded to be well settled that a railroad in a city was neither, *per se*, a nuisance or a purpresture.[2]

Other cases have arisen, which have called for the aid of a court of equity to enforce the claim of creditors against individual stockholders of a corporation made liable in a certain contingency by the terms of their charter. An example of this kind of relief arose under the general manufacturing act of 1811.[3] By the seventh section of that act it was provided that for all debts that shall be due and owing by the company at the time of its dissolution, the persons then composing the company shall be individually responsible to the extent of their respective shares of stock in said company, and no further." A creditor of a corporation framed under the act in question filed his bill against the stockholders to compel payment of his debt, alleging amongst other things, in substance, that the corporation had become dissolved by the sale of all its property by the sheriff under an execution against it, and by its ceasing for more than a year thereafter to transact any corporate business. The chancellor admitted that a corporation might be dissolved, if it becomes incapable of continuing its corporate succession, or executing its corporate functions; as by the death of all its members, or the destruction of an integral part of it, or it might be dissolved by surrender of its franchises into the hands of the government, or by a forfeiture of its charter through abuse or neglect of its franchises; but he thought the forfeiture in such case should be judicially ascertained and declared, by a proceeding under the process of *scire facias* at the suit of the government in a court of law. And he accordingly dismissed the bill.[4] On appeal to the court for the

[1] 2 J. Ch. R. 389.

[2] 2 J. Ch. R. 389. See on that point, Drake v. The Hudson River R. R. 7 Barb. 528. Plant v. The Long Island R. R. 10 id. 26.

[3] 1 R. L. of 1813, p. 245.

[4] Slee v. Bloom, 5 J. Ch. R. 366, 381.

correction of errors, the decision of the chancellor was reversed, and relief was granted to the complainant. The prevailing opinion was delivered by Spencer, Ch. J., and he put his opinion that the corporation was dissolved, on the ground that it had done and suffered acts to be done, equivalent to a direct surrender of its franchises. Such surrender he considered as an act *in pais*. And in point of good sense he thought that the corporation was dissolved, *within the meaning and intent of the act, as regarded creditors*, when it ceased to own property, real or personal, and ceased for upwards of a year from doing any act manifesting an intention to resume its corporate functions.[1] The doctrine of the court of errors was followed by the chancellor in a subsequent case, and affirmed on appeal by the court for the correction of errors.[2] The property of a dissolved corporation under the statute must be treated clearly as a trust fund for the benefit of its creditors; and the jurisdiction of courts of equity to reach it is through its general jurisdiction over trusts. The personal liability of the stockholders, which in some cases is superadded to the property of the corporation, as a fund for the payment of its debts, partakes of the character of the fund to which it is auxiliary; and can be appropriately reached only by the instrumentality of a court of equity.

In a case somewhat earlier than that of Slee v. Bloom, the attorney general filed an information *ex officio* against the Utica Insurance Company to restrain it by injunction from exercising banking powers, in violation of the restraining act then in force.[3] The chancellor conceded that banking had become a franchise derived from the grant of the legislature, and subsisting only in those who could produce the grant; and if exercised by others, it was a usurpation of a privilege for which a competent remedy could be had by the public prosecutor in the supreme court. But he denied that a court of equity had concurrent jurisdiction in the case. And he doubted whether the English court of chancery entertained jurisdiction over corporations, except in cases of breach of trust, and whether it was not confined to charitable institutions.[4] The bill having been dismissed by the chancellor, the attorney general filed an information in the supreme court in the nature of a *quo warranto* against the same company, and obtained a judgment of ouster.[5] The decision in this case and n that of Slee v. Bloom, led to the adoption of the act of 1825, relative

[1] Slee v. Bloom, 19 J. R. 456; reversing previous case before the Ch., 5 J. Ch. R. 366.

[2] Penniman v. Briggs, Hopk. 300; S. C. 8 Cowen, 387.

[3] 2 R. L. 234.

[4] Att'y Gen. v. Utica Ins. Co. 2 J. Ch. R. 371.

[5] The People v. Utica Ins. Co. 15 J. R. 358.

to fraudulent bankruptcies of incorporated companies, and to the provisions of the Revised Statutes relative to proceedings against corporations in equity, which will shortly be considered.[1]

The legislature have deemed it fit to create corporations, with power to execute trusts. The New-York Life Insurance and Trust Company, incorporated in 1830,[2] is an institution of great resources, and has been conducted with eminent ability, and fidelity to the purposes for which it was created. It is authorized, among other things, to receive moneys in trust to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on, not exceeding, in either case, the legal rate. It is also empowered to execute all such trusts as may be committed to it by any person or persons whatever, or may be transferred to it by order of the court of chancery or a surrogate. It can be appointed in certain cases, by the court of chancery, now the supreme court, or a surrogate, the guardian of the estate of infants, whose annual income exceeds one hundred dollars, and is not required to give a bond or other collateral security.

There can be no doubt, that without any further legislation on the subject such a corporation could be proceeded against in equity to enforce the execution of any trust committed to it, and for an account of the trust funds. It might doubtless, in cases of gross abuse, be removed as a trustee, without displacing from their appropriate offices, the trustees or other managing agents of the corporation. Independently of statutory authority, it is held that courts of equity cannot remove a trustee of an incorporation, even for a breach of trust.[3] The relation of the trustees to the corporation, it was said in the same case, is not that of a private trustee to the *cestui que trust*. They are merely the managing agents by whom the business of the corporation is performed. While they may be compelled to the faithful execution of the trusts confided to them, they can only be removed by a court of equity, in cases within the statute which confers upon the court that power.

At common law, upon the dissolution or civil death of a corporation, all its real estate remaining unsold, reverts back to the original grantor or his heirs,[4] and its personal property vests in the people as succeeding

[1] L. of 1825, p. 448. 2 R. S. 461.

[2] L. of 1830, p. 76; amended, 1834, p. 445.

[3] Robertson v. Bullions, 9 Barb. 65; affirmed, 1 Kern. 243; disagreeing with Kniskern v. The Lutheran Churches, 1 Sandf. Ch. R. 439. Lawyer v. Sipperly, 7 Paige, 286. Bowden v. McLeod, 1 Edw. Ch. R. 588.

[4] Hooker v. Utica Turnpike Co. 12 Wend. 373. Ang. & Ames on Corporations, 159.

to the prerogatives of the crown; and the debts due to and from the corporation are extinguished.[1] These common law consequences of a dissolution, are usually, in this country, prevented by some provision ir the charter, or by the general statutes of the state. In this state, by the general act relative to turnpikes, and which by a subsequent act is made applicable to the existing plank road and turnpike incorporations, provision is made for the dissolution of the corporations by the legislature, when by the income arising from tolls, they shall have been compensated for all moneys expended in purchasing, making, repairing and taking care of their road, and have received in addition thereto, an average annual interest at the rate of ten per cent; and on such dissolution, all the rights and property of such corporations vest in the people of the state.[2] By another act, it is declared that whenever a turnpike corporation, or a corporation owning a toll-bridge shall become dissolved, the road and bridge shall become a public highway.[3] The general act, which provides, doubtless, for all cases not specially provided for in the charter or act of incorporation, enacts that upon the dissolution of any corporation created or to be created, unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain, after the payment of debts and necessary expenses. By a subsequent section, the persons so constituted trustees, are authorized to sue for and recover, the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and are made jointly and severally responsible to the creditors and stockholders of such corporation, to the extent of its property and effects that shall come into their hands.[4]

It is quite obvious that the settlement of such matters cannot in general be accomplished without the aid of a court of equity.

The non-payment of its debts does not at common law work a dissolu-

[1] Id 160. McLaren v. Pennington, 1 Paige, 111. Bac. Abr. tit. Corporation, letter (G.) § 47.

[2] 1 R. S. 580, § 16 L. of 1847, p. 221,

[3] L. of 1838, p. 254, ch. 262.

[4] 1 R. S. 600, 601, §§ 9, 10

tion of a corporation.[1] The mode of proceeding against insolvent corporations will be pointed out in the next section.

As a corporation may hold, purchase and convey such real and personal estate, as may be required for its purposes, so it may mortgage the same to raise money for any legitimate object. A railroad corporation is expressly authorized by the general act of 1850, to borrow such sums of money, from time to time, as may be necessary for completing and finishing, or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company. This provision is made applicable to all other railroad corporations, and the right of mortgaging the franchises of the corporation is recognized by the act of 1853.[2] The franchise of the corporation is that political right, derived from the act of incorporation, by which the corporation is enabled to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession, with these qualities, that corporations were invented and are in use.[3] The sale by virtue of a decree granted on a mortgage foreclosure of the franchises and corporate property vests in the purchaser the right to use and enjoy both, as the same were used and enjoyed when the mortgage was given; without any liability for debts or obligations created subsequent to the mortgage. This is a legitimate inference from the power to mortgage the franchise and corporate property. The corporation still subsists notwithstanding the foreclosure, and its business can be carried on under the original charter, by the purchasers or their assigns.[4]

[1] Slee v. Bloom, 5 J. Ch. R. 379, 381. The Trustees of Vernon v. Hills, 6 Cowen, 26. Dartmouth College v. Woodward, 4 Wheat. 698.

[2] L. of 1850, p. 225, § 28, sub. 10, § 49. L. of 1853, p. 966, § 2.

[3] Per Marshall, Ch. J. in Dartmouth College v. Woodward, 4 Wheat. 636.

[4] Wilde v. Jenkins, 4 Paige, 481, 488. 2 Kent's Com. 312.

SECTION II.

OF PROCEEDINGS AGAINST CORPORATIONS IN EQUITY, UNDER THE REVISED STATUTES.

WE have hitherto spoken of the remedy in equity against corporations, which does not impair the existence of the corporation, and which only acts upon the conduct of the corporation or its officers, with reference to property, or the rights and equities of others. We proceed now to notice the more enlarged jurisdiction in equity, conferred by statute, and which may be exerted against the corporation itself, or its trustees or managing agents, in a more summary and comprehensive way. The object of the legislature seems to have been to give the court of chancery in this state, the same power that is exercised by that court in England in cases of charitable corporations, and in other cases; and to confer upon the court a superintending or visitatorial power over all civil corporations, not excepted from its provisions.[1] It thus confers upon that court the power which Chancellor Kent declined to exercise in the Attorney General v. The Utica Insurance Company, (supra.)

The jurisdiction to vacate and annul an act of incorporation on the ground that it was passed upon some fraudulent suggestion or concealment of a material fact, made by the persons incorporated by such act, or made with their consent or knowledge, belonged to the supreme court, and was exercised by writ of *scire facias*, in cases where the legislature specially directed the attorney general to prosecute the same.[2] In case any association or number of persons, should act within this state, as a corporation, without being legally incorporated; or in case any corporate body should offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or 2, violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or 3, whenever it shall have forfeited its privileges and franchises by non user; or 4, whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or 5, whenever it shall exercise any franchise or privilege not conferred upon it by law, authority was given by the Revised Statutes, to the attorney general to file an information in the nature of a quo warranto upon his own relation, with a view to a judgment of ouster, and dissolution

[1] 3 R. S. 755, Reviser's Notes.

[2] 2 R. S. 579, § 13.

of the corporation.[1] The supreme court alone had jurisdiction in such cases. But with a view to prevent any injury to the public being done by such persons or body corporate, pending the proceedings in the supreme court, the Revised Statutes also authorized the chancellor, upon a bill filed by the attorney general, to restrain by injunction any corporation from assuming or exercising any franchise, liberty, or privilege, or transacting any business not allowed by the charter of such corporation; and in the same manner to restrain any individuals from exercising any corporate rights, privileges, or franchises, not granted to them by any law of this state. The injunction was allowed to be issued on proper proof before answer, and after the coming in of the answer, to be continued until judgment at law should have been had.[2]

Though the proceeding by scire facias, quo warranto and informations in nature of quo warranto, has been abolished by the code, and new remedies substituted, the foregoing provisions in relation to an injunction from a court of equity, pending the proceeding at law, do not seem to be abrogated; nor to be incompatible with the new remedies provided.[3] It is a proceeding merely auxiliary to the more important remedy prosecuted at law, though the practice with respect to it, is modified by the code.[4]

But a court of equity has now by statute, jurisdiction over directors, managers and other trustees and officers of corporations, and over insolvent corporations in a variety of cases, and as incidental to this latter jurisdiction, may, in a proper case, adjudge a corporation to be dissolved.[5]

Thus, by the 33d section, the chancellor has jurisdiction over directors, managers and other trustees and officers of corporations, 1. To compel them to account for their official conduct, in the management and disposition of the funds and property committed to their charge; 2, To decree and compel payment by them, to the corporation, whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves, or transferred to others, or may have lost or wasted, by any violation of their duties as such trustees; 3. To suspend any such trustee or officer from exercising his office, whenever it shall appear that he has abused his trust; 4. To remove any such trustee or officer from his office, upon proof or conviction of gross misconduct; 5. To direct new elections to be held by the body or board duly authorized for that purpose, to supply vacancies created by

[1] 2 R. S. 581, 583.
[2] 2 R. 462, § 31, 32.
[3] Code of Procedure, 428–447.
[4] Id. §§ 218, 219.
[5] 2 R. S. 462, § 33, p. 463, § 38. Ward v. Sea Insurance Co. 7 Paige, 298.

such removal; 6. In case there be no such body or board, or all the members of such board be removed, then to report the same to the governor, who shall be authorized, with the consent of the senate, to fill such vacancies; 7. To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of such incorporation, in cases where the person receiving such alienation knew the purpose for which the same was made.

The jurisdiction under the preceding section was exercised by the court of chancery, as in ordinary cases, by bill or petition as the case might require or as the chancellor might direct; and it was so exercised either at the instance of the attorney general, prosecuting in behalf of the people of this state, or at the instance of any creditor of such corporation, or at the instance of any trustee or other officer of such corporation, having a general superintendence of its concerns.[1]

The union of law and equity in the same court and the abolition of the former pleadings, will doubtless lead to some changes in the application of these remedies; but the rights and substantial remedies still remain. By the code, a proceeding formerly belonging to the criminal side of the court has been converted into a civil action. Though the name is thus changed, the injury to be redressed, and the nature of the relief afforded, remain essentially as they were before.[2]

The New-York Revised Statutes contain numerous regulations, with respect to insolvent corporations, and to restrain the abuses of their powers, by corporations generally. Religious corporations, and a few other corporations of a kindred character, are excepted from the operation of these provisions.[3] These statutes are in truth statutes of bankruptcy, in relation to the corporations to which they are applicable, and are an expansion and improvement upon our earlier legislation upon this subject.[4] The court of chancery was, at an earlier day, authorized in certain cases, to decree the dissolution of certain insurance companies, and to direct a distribution of their assets, among their creditors and stockholders, through the intervention of trustees, appointed by the court.[5]

The existing statutes provide for two classes of cases; the one on the application of the attorney general, in behalf of the state, or of a creditor or stockholder of such corporation, upon bill or petition, setting forth its insolvency, or other facts authorizing the interposition of the court;[6] and

[1] 2 R. S. 463, § 35.

[2] Compare 2 R. S. 579, § 13, with Code, § 429, and 2 R. S. 583, § 39, with Code, § 430.

[3] 2 R. S. 466, § 57. 1 R. S. 605 § 11.

[4] L. of 1825, p. 448, ch. 325.

[5] L. of 1817, p. 150, ch. 146. L. of 1821, p. 141, ch. 148.

[6] 2 R. S. 464, § 40.

the other, on the application of the directors, trustees or other officers having the management of the concerns of the corporation, for its dissolution on the ground that its property has become so reduced by losses or otherwise, that it will not be able to pay all its just demands, or afford reasonable security to those who may deal with it.[1] The object of both statutes is to secure a ratable distribution of the property of the corporation among its creditors, subject to the legal priorities of the United States.[2]

In the first class of cases, whenever any incorporated company shall have remained insolvent for one whole year; or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt; or for one year shall have suspended the ordinary and lawful business of such corporation; it shall be deemed to have surrendered the rights, privileges and franchises granted by any act of incorporation, or acquired under the laws of the state, and shall be adjudged to be dissolved.[3] In Slee v. Bloom, (supra,) the court of errors held that a bill by a creditor could be sustained, against individual stockholders, who were made liable for the debts of the corporation, on its dissolution, without having the dissolution declared by any judicial proceeding.[4] This decision as applicable to that case, and in favor of the remedy of the creditors, against stockholders made personally liable by the terms of the charter, for the debts of the corporation, was well enough. But the present statute evidently contemplates, that the court of equity, whose aid is invoked in favor of the creditor, under that section, shall dissolve the corporation, if the facts be made out which the section contemplates to exist, and appoint a receiver to wind up the affairs of the company and to distribute its surplus funds if any, amongst its stockholders.[5] The decree for closing the affairs of the insolvent corporation under the statute, seems necessarily to be based upon the decree for a dissolution of the corporation.[6]

In the other class of cases, where the application is made for a dissolution of the corporation by its own officers, the statute has very properly declared, that all sales, assignments, transfers, mortgages and conveyances of any part of the estate real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of or as a security for any existing or

[1] 2 R. S. 467, § 58 et seq.
[2] 2 R. S. 470, § 79.
[3] 2 R. S. 463, § 38.
[4] Slee v Bloom. 19 J. R. 456.
[5] Ward. v. Sea Ins. Co. 7 Paige, 298.
[6] Mickles v. The Rochester City Bank, 11 Paige, 126.

prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation.[1]

With regard to corporations having banking powers, or having the power to make loans on pledges or deposits, or authorized by law to make insurances, if the same shall become insolvent, or unable to pay their debts, or shall have violated any of the provisions of their act of incorporation, or of any other act binding on such corporation, the court of chancery, now the supreme court, is authorized by injunction to restrain such corporation and its officers from exercising any of its corporate rights, privileges or franchises, and from collecting or receiving any debts or demands, and from paying out or in any way transferring or delivering to any person any of the moneys or effects of such corporation, until such court shall otherwise order.[2] The injunction in such case may be granted on the application of the attorney general, in behalf of the state, or of any creditor or stockholder of such corporation, upon bill or petition.[3]

There are still more stringent provisions in relation to all corporations, not expressly excepted, such as corporations for a library, or a religious society, or moneyed corporations otherwise provided for, which interdict, under certain circumstances, any transfer or assignment of their property. Thus, whenever *any* incorporated company shall have refused the payment of any of its notes, or other evidences of debt, in specie, or lawful money of the United States, it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company, directly or indirectly for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever; and every such transfer or assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be utterly void; and whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to redeem its notes or other evidences of debt, in specie or other lawful money of the United States, or for one year shall have suspended the ordinary business of such incorporation, such company shall thereupon be deemed and adjudged to have surrendered the rights, privileges and franchises, granted by any act of incorporation, and shall be deemed to be dissolved.[4]

[1] 2 R. S. 469, § 71.
[2] 2 R. S. 463, § 39.
[3] Id. § 40.
[4] 1 R. S. 603, § 4.

This statute has been held not to be confined to moneyed corporations, but to embrace all corporations not expressly excepted from its operation. And thus it was held to extend to the act incorporating the New-York and Erie Railroad Company, notwithstanding the charter of the company expressly referred to, and was made subject to certain other provisions of the Revised Statutes, specifically mentioned, and was silent as to the foregoing.[1]

Although a corporation is deemed to have surrendered its charter in consequence of non-user, or by continued insolvency, or the non-payment of its notes or other evidences of debt for one whole year, yet it does not become *ipso facto* dissolved. But it continues to exist until its dissolution is judicially declared, by a decree of the court of chancery, or by the judgment of the supreme court upon a *quo warranto*. And until such decree, or judgment, any of the creditors of such corporation may proceed by suit, against it or its property, to obtain satisfaction of their debts, unless restrained by injunction.[2]

In a bill filed by a creditor under the statute, to obtain a decree dissolving a corporation, and distributing its effects among its creditors and stockholders, the corporation itself is a necessary party.[3] But where the property of the company is all exhausted, and the bill is filed for the sole purpose of compelling its stockholders to pay the corporate debts out of their individual property, it seems the corporation is not a necessary party although its dissolution has not been judicially declared.[4]

The relation which stockholders of an incorporation bear to each other with respect to the corporate property is not that of tenants in common, or partners, either before or after the dissolution. Before the dissolution the whole title is in the corporation itself, as the legal owner; and upon its dissolution, if no other provision is made, the whole title vests in the directors or trustees then in office, as trustees for the creditors and stockholders, under the general provisions of the Revised Statutes.[5]

We pass now to some other matters connected with the liability of corporations in equity, and the mode of enforcing them.

With respect to the remedy of a judgment creditor of a corporation whose execution has been returned unsatisfied in part or in whole, it has been decided that he cannot resort to a creditor's bill and thus acquire a lien upon the effects of the corporation in his own favor in preference to

[1] Bowen v. Leare, 5 Hill, 221.

[2] Mickles v. The Rochester City Bank, 11 Paige, 118.

[3] Id

[4] Id.

[5] 1 R. S. 600, § 9. Mickles v. The Rochester City Bank, 11 Paige, 128.

other creditors. But his remedy is under the statute to obtain a sequestration of the stock, property, things in action and effects of the corporation, and the appointment of a receiver.[1] This proceeding may be by bill or petition; but a proceeding by bill is the preferable course, if the creditor intends to proceed against the directors or stockholders, to charge them personally, in case of deficiency of the corporate property to pay the debts of the corporation. And the stockholders of an insolvent corporation, who have not paid the full amount of their stock, are liable to the creditors of the corporation to the extent of what remains unpaid, upon their several shares of such stock; or of so much thereof as may be necessary to supply the deficiency in the assets of the corporation to pay its debts.[2] The receiver appointed under a decree sequestrating the effects of the corporation, is vested with all the estate real and personal, of the corporation, from the time of filing his security, and becomes the trustee of the estate for the benefit of the creditors of such corporation and of its stockholders.[3] He possesses by statute, the same power and authority as are conferred by law upon trustees to whom an assignment of the estate of an insolvent debtor may be made pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes.[4] Those trustees are required by law to make an equal distribution among the creditors, after satisfying the claims which are preferred by the laws of the United States.[5]

Independently of the Revised Statutes, and of the general doctrines of a court of equity, the directors of a moneyed or other joint stock corporation, who willfully abuse their trust, or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good the loss. They are equally liable if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust. And a court of equity has power to call them to account. The directors are the trustees or managing agents, and the stockholders are the *cestui que trusts*, and have a joint interest in all the property and effects of the corporation.[6] As was held by Lord Hardwicke, in a memorable case, a court of equity can

[1] 2 R. S. 463, § 36. Lowene v. Amer. Fire Ins. Co. 6 Paige, 482. Morgan v. N. Y. and Albany R. R. 10 id. 291.

[2] Id.

[3] 2 R. S. 463, § 38, 469, § 67. Laws of 1852, p. 67, ch. 71. Mann v. Pents, 2 Sandf. Ch. R. 257. L. of 1854, p. 502, ch. 224.

[4] 2 R. S. 40 et seq.

[5] Id.

[6] Robinson v. Smith, 3 Paige, 251 Cunningham v. Pell, 5 id. 607.

lay hold of every breach of trust, be it in a public or private capacity.[1] As already intimated, the Revised Statutes extended the principles which were formerly applied to charitable corporations in England, to the jurisdiction of the court of chancery in this state over corporations. In some respects they are merely declaratory, and in others they are introductory of new and salutary rules.

In New-York there are numerous corporations where the principle of personal liability of the stockholders exists, either concurrently with that of the corporation, or as auxiliary to it. To collect a list of these various charters, and point out the distinctions between them and the practices to which they have given rise, is foreign from the object of this treatise. Some of these have given rise to much litigation and to many conflicting decisions.[2]

If by the act of incorporation, the stockholders be jointly and severally personally liable for the payment of all debts or demands contracted by the corporation, and be liable to be prosecuted therefor, after a judgment for such demand shall have been obtained against the corporation, and an execution thereon shall have been issued and returned unsatisfied in whole or in part, or the said corporation shall have been dissolved, as in the case of the stockholders of the Rossie Galena Company and Rossie Lead Mining Company,[3] still it is obvious, that though the creditor's remedy be at law, the stockholder who shall have been compelled to pay the debt, has no recourse but to a court of equity to compel contribution from those who are equally liable with himself. Under the charter of the Rossie Lead Mining Company, no stockholder was liable but he who was a stockholder at the time the debt was contracted.[4] A party who became a stockholder after the debt was contracted, was not liable for such debt. Hence, it was held that creditors of the company whose debts had been contracted by such company at different times, having no common interest in the individual liability of different stockholders, could not litigate their claims against such stockholders in a single suit.[5]

The stockholders, too, in such a company, being individually liable for the whole amount of each debt contracted while they were stockholders,

[1] The Charitable Corporation v. Sutton, 2 Atk. 405.

[2] Moss v. McCullough, 5 Hill, 131. 7 Barb. 279. Allen v. Sewall, 2 Wend. 327. Moss v. Oakley, 2 Hill, 265. Bailey v. Bancker, 3 id. 188. Adderly v. Storm, 6 id. 624. Worrall v. Judson, 5 Barb. 210. Harger v. McCullough, 2 Denio, 119. Corning v. McCullough, 1 Comst 47.

[3] Laws of 1837, pp. 441, 445, chs. 396, 401.

[4] Moss v. Oakley, 2 Hill, 265.

[5] Judson v. The Rossie Galena Co. 9 Paige, 598.

they are not entitled to an injunction to restrain the prosecution of suits against them, and to compel the creditors to come in and prove their debts under the decree in the first suit. It is otherwise under the Revised Statutes, which render the directors jointly liable to the creditors and stockholders for losses occasioned by breach of duty; and which renders the stockholders liable to the creditors, in cases of fraudulent insolvencies, to the extent of their stock, where there is a deficiency in the effects of the corporation which could not be charged upon or collected from the directors who were responsible for the fraud. In such a case no one of the creditors could collect the whole of the debt from those who were liable to all the creditors collectively to a limited amount. The proceedings to compel a ratable contribution to the amount of their several debts, must, therefore, be analogous to the proceedings against the estate of an insolvent testator, or intestate, in the hands of his personal representatives; not only in relation to the corporate effects but also as to the limited liabilities of the directors and stockholders.[1]

Accordingly it is enacted that whenever any bill shall be filed, or any application made against a corporation, its directors or other superintending officers or its stockholders, according to the provisions of title 4 of chapter 8, part 3d of the Revised Statutes, the court may, by injunction, on the application of either party, and at any stage of the proceedings, restrain all proceedings at law, by any creditor against the defendants in such suit; and whenever it shall appear necessary or proper, may order notice to be published, in such manner as the court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the suit, within a reasonable time, not less than six months from the first publication of such order, and in default thereof, to be precluded from all benefit of the decree which shall be made in such suit, and from any distribution which shall be made under such decree.[2]

Enough has been shown under this head, to exemplify the jurisdiction of equity in respect to corporations. To pursue the subject more in detail would be to encroach upon ground more proper to be discussed in a treatise upon the practice of the courts, and upon subjects exclusively of legal cognizance. The number of corporations in this state, amenable in some form or other to the jurisdiction of equity, is vastly numerous. Their charters, though containing some provisions in common, are often extremely dissimilar. The amount of property they own or control, the

[1] Judson v. The Rossie Galena Co. 9 Paige, 602. 2 R. 466, § 56.

[2] Id. Matter of the Receiver of the City Bank of Buffalo, 19 Paige, 378. Morgan v. N. Y. and Albany R. R. id. 290. Mann v. Pentz, 3 Comst. 415. James v. Woodruff, 5 Paige, 541. 2 Denio, 574

number of individuals engaged in the management of their affairs, and the complicated nature of their transactions, give rise to a great variety of intricate and interesting questions for judicial decision. Equity, by means of its general jurisdiction over frauds, trusts and matters of account, as well as by the express provisions of various statutes, has acquired cognizance of these matters, sometimes concurrently with courts of law, but more frequently, by reason of the remedy at law, being altogether inadequate. A thorough knowledge of the subject cannot be acquired without an intimate acquaintance with an extensive mass of legislation, and with the law of corporations generally, and the decision of our courts upon the various points which have arisen and been decided.

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